In the Supreme Court of the United States.

OCTOBER TERM, 1914.

No. ——, Original.

EX PARTE THE UNITED STATES, PETITIONER.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

The petitioner in the above-entitled matter respectfully asks the court for leave to file the petition presented herewith, wherein it asks for a writ of mandamus, directed to the Honorable John M. Killits, United States District Judge for the Northern District of Ohio, directing him to vacate a certain order made by him suspending the execution of a judgment in the case of the United States against James J. Henahan, by which the said James J. Henahan was ordered to be imprisoned in the penitentiary at Leavenworth, Kans., for a period of five years and to pay the costs of the prosecution.

THE UNITED STATES.
By THOMAS WATT GREGORY,
Attorney General.
JOHN W. DAVIS,
Solicitor General.
WILLIAM WALLACE, JR.,
Assistant Attorney General.

MAY, 1915.

94213—15—1

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

No. ——, Original.

EX PARTE THE UNITED STATES, PETITIONER.

PETITION FOR MANDAMUS.

Your petitioner, the United States, respectfully represents as follows:

On the 5th day of March, A. D. 1915, a grand jury of the United States lawfully summoned in the Western Division of the Northern District of the State of Ohio, presented an indictment against one James J. Henahan for violations of the banking laws of the United States. The indictment contained four counts.

The first count charged that the said Henahan, being then and there assistant cashier and head paying teller of a national banking association, organized and existing under and by virtue of the laws of the United States, did unlawfully, knowingly, and feloniously embezzle from said association the sum of three thousand dollars ($3,000), with intent to injure and defraud the said association, contrary to the statute provided for such cases.

The second count of the indictment charged said Henahan with having unlawfully, knowingly, and

feloniously embezzled seventeen hundred dollars ($1,700) from the said banking association with like intent, contrary to the form of the statute provided for such cases.

The third count charged the said Henahan with making a false entry on the books of the said banking association with intent to injure and defraud the said banking association and to deceive the president and directors of said association and any agent appointed to examine its affairs, contrary to the form of the statute provided for such cases.

The fourth count charged the said Henahan with making a false entry on the books of the said association with like intent to defraud and injure it and to deceive the president and directors thereof and any agent appointed to examine the affairs of said banking association.

On the 15th day of March, A. D. 1915, the said Henahan, accompanied by counsel, and being arraigned, pleaded to the said indictment that he was guilty as therein and thereby charged.

Whereupon the court sentenced the said Henahan to be imprisoned in the penitentiary at Leavenworth, Kans., for a period of five years and that he pay the costs of the prosecution.

Subsequently, but on the same day, the court entered the following order:

> The defendant being before the court under sentence heretofore imposed upon him herein, it is now, on his application, ordered that the execution of the sentence be, and it is hereby, suspended during the good behavior of the

> defendant, and *for the purpose of this case this term of this court is kept open for five years;* to which order of the court in suspending said sentence the United States attorney objects, for the reason that the court has no jurisdiction to suspend the execution of said sentence, and excepts to the order suspending the sentence.

When this order was entered suspending the execution of the sentence of imprisonment, there were no proceedings pending for a review of the said judgment, and nothing requiring further action by the court making the order was necessary before the said judgment should become final, except such as might arise under said order of suspension.

Said order of suspension having been entered, your petitioner moved on the 25th day of March, A. D. 1915, for a vacation of this order on the ground that the court had no power to make the same, but on the 9th day of April, A. D. 1915, the said District Court for the Northern District of Ohio overruled the motion.

Thereupon, on the 9th day of April, A. D. 1915, your petitioner applied to the clerk of the said court for an order of commitment under the original judgment sentencing the said Henahan to five years in the United States penitentiary at Leavenworth, Kans., and on the same day the clerk of the said court refused to issue said order of commitment for the reason that the said judge of the District Court for the Northern District of Ohio had suspended the execution of the sentence.

Thereupon, on the 9th day of April, A. D. 1915, your petitioner filed a motion for the execution of the judgment whereby the said Henahan was ordered to be imprisoned for a period of five years in the penitentiary at Leavenworth, Kans., and for an order directing the clerk forthwith to issue an order of commitment upon the said judgment. On the said 9th day of April, A. D. 1915, the court overruled said motion, and in doing so filed an opinion in which it is explicitly stated that the suspension of the execution of the judgment was not made for any reasons connected with a review of the decision, or an application for a pardon, but that it had been granted in the exercise of an alleged power in the Federal judges to mitigate the harshness of the law, and to protect defendants where the penalty imposed by the statutes of the United States seemed to the court too severe.

Your petitioner claims that the action of the United States District Court for the Northern District of Ohio, in thus suspending the execution of a sentence imposed, pursuant to the statutes of the United States, upon a defendant in a criminal cause was entirely without warrant of law, and is therefore null and void.

There is attached hereto a printed copy of the record of the proceedings in the cause, marked Exhibit "A," and of the original bill of exceptions allowed and signed by the judge of the District Court for the Northern District of Ohio, marked Exhibit "B." All the matters herein alleged are of record.

Wherefore, your petitioner prays that an alternative writ of mandamus issue out of this court to the Honorable John M. Killits, United States district judge for the Northern District of Ohio, and to the court itself, directing that the order entered on the 15th day of March, A. D. 1915, suspending the execution of the judgment against the said Henahan be vacated and set aside, or that the said Honorable John M. Killits, judge of said court, show cause on a day to be fixed by this honorable court why this should not be done.

THE UNITED STATES,
By THOMAS WATT GREGORY,
Attorney General.
JOHN W. DAVIS,
Solicitor General.
WILLIAM WALLACE, JR.,
Assistant Attorney General.

MAY, 1915.

CITY OF WASHINGTON,
District of Columbia, ss:

Personally came before me the subscriber, John W. Davis, Solicitor General, attorney for the petitioner, who, being duly sworn, says that the foregoing petition is true in point of fact.

Sworn and subscribed to before me, a notary public in and for the District of Columbia, this seventeenth day of May, 1915.

CHAS. B. SORNBORGER,
Notary Public.

EXHIBIT "A."

Proceedings in the cause.

UNITED STATES OF AMERICA, NORTHERN DISTRICT OF OHIO, WESTERN DIVISION, ss.

Record of the proceedings of the District Court of the United States within and for the Western Division of the Northern District of Ohio, in the cause and matter hereinafter stated, the same being finally disposed of at a regular term of said Court begun and held at the city of Toledo, in said District, on the last Tuesday in October, being the 27th day of said month, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States of America, the one hundred and thirty-ninth, to wit: On the 15th day of March, A. D. 1915.

Present: The Honorable John M. Killits, U. S. District Judge.

THE UNITED STATES
vs.
JAMES J. HENEHAN. } Criminal No. 1558.

Said Action was commenced on the 5th day of March, A. D. 1915, and proceeded to final disposition at the term and day above written, and, during the progress thereof, pleadings and papers were filed, process was issued and returned, and orders of the

court were made and entered in the order and on the dates hereinafter stated, to wit:

Be it remembered that heretofore, to wit, on the 5th day of March, A. D. 1915, came a Grand Jury of the United States, to-wit: W. J. Alexander, Grattan H. Baker, W. W. Bright, Will F. Broer, Geo. Carr, W. J. Clark, Frank Seebach, Henry Dowling, A. L. Gamble, David J. Giffin, Alton Gregg, Harry Heffner, C. C. Heller, Louis Koch, J. J. McMann, Cort M. Shock, J. D. Simon, Horace Sponsler, W. D. Wilson, who having been duly impaneled, sworn and charged according to law, presented to said court an indictment endorsed, "A true bill, Will F. Broer, Foreman of Grand Jury."

INDICTMENT. No. 1558.

THE UNITED STATES OF AMERICA NORTHERN DISTRICT OF OHIO WESTERN DIVISION ss:

In the District Court of the United States, within and for the Division and District aforesaid.

At the October Term of said Court, in the year of our Lord one thousand nine hundred and fourteen.

The Grand Jurors of the United States of America, duly impaneled, sworn and charged to inquire of crimes and offenses within and for the body of the Western Division of the Northern District of Ohio, upon their oath present and find that

Sec. 5209, R. S.] JAMES J. HENAHAN,

late of the Division and District aforesaid, heretofore, to-wit, on or about the 13th day of June, in the year of our Lord one thousand nine hundred and fourteen, at Toledo, in the County of Lucas, in the Division and District aforesaid, and within the juris-

diction of this court, being then and there assistant cashier and head paying teller of a national banking association, organized and existing under and by virtue of the laws of the said United States, to-wit, the Second National Bank of Toledo, did, by virtue of his said office as assistant cashier and head paying teller, and while he was employed therein, have in his possession and custody divers moneys and funds of the value of three thousand dollars ($3,000.00) of the moneys and funds of the said banking association, and the said James J. Henahan, then and there having in his possession as assistant cashier and head paying teller the said moneys and funds of said banking association, then and there unlawfully, knowingly and feloniously did embezzle and abstract from the said banking association the said sum of three thousand dollars ($3,000.00) as aforesaid, with intent to injure and defraud the said banking association; contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

COUNT 2.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and find that the said

heretofore, to-wit: on or about the 20th day of July, in the year of our Lord nineteen hundred and fourteen, at Toledo, in the County of Lucas, in the Division and District aforesaid, and within the jurisdiction of this court, being then and there assistant cashier and head paying teller of a national banking association, organized and existing under

and by virtue of the laws of the said United States, to-wit, the Second National Bank of Toledo did, by virtue of his said office as assistant cashier and head paying teller, and while he was employed therein, have in his possession and custody divers moneys and funds of the value of one thousand seven hundred dollars ($1700.00) of the moneys and funds of the said banking association, and the same James J. Henehan, then and there having in his possession as assistant cashier and head paying teller the said moneys and funds of said banking association, then and there unlawfully, knowingly and feloniously did embezzle and abstract from the said banking association the said sum of one thousand seven hundred dollars, as aforesaid, with intent to injure and defraud the said banking association; contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

COUNT 3.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and find that the said

heretofore, to-wit, on or about the 13th day of June, in the year of Our Lord nineteen hundred and fourteen, at Toledo, in the County of Lucas, in the Division and District aforesaid, and within the jurisdiction of this court, being then and there assistant cashier and head paying teller of a national banking association; organized and existing under and by virtue of the laws of the said United States, to wit, the Second National Bank of Toledo, did unlawfully and feloniously, wilfully and with intent to deceive the president and directors of the said banking association

and any agent appointed to examine the affairs of the said banking association, and with intent to defraud and injure said banking association, make a certain false entry in a certain report and statement of the said banking association, said report and statement being a debit slip and the original entry of the matters thereon contained, and being then and there used for the purpose of entering upon the general ledger of said banking association the matters thereon contained, which said false entry was false in this, to-wit, that upon said debit slip the said James J. Henehan then and there entered the words and figures, "Mut. Cy. a/c $11500.00," meaning and intending to convey to the officers and bookkeepers of said banking association that the sum of eleven thousand five hundred dollars ($11,500.00) in mutilated currency had been by the said James J. Henehan shipped to the Treasurer of the United States, and that said amount of eleven thousand five hundred dollars ($11,500.00) should be charged on the general ledger of said banking association against the mutilated currency account; whereas, in truth and in fact, the said James J. Henehan had shipped the sum of eight thousand five hundred dollars ($8,500.00) only in mutilated currency to the Treasurer of the United States, and that said debit slip was false in the amount of money written thereon; he, the said James J. Henehan, intending thereby then and there, at the time and place of so making said false entry, to injure and defraud the said Second National Bank and to deceive the officers of said banking association and any agent appointed to examine the affairs of said banking association; contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

COUNT 4.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and find that the said

heretofore, towit, on or about July 20th, in the year of Our Lord one thousand nine hundred and fourteen, at Toledo, in the County of Lucas, in the Division and District aforesaid, and within the jurisdiction of this court, being then and there assistant cashier and head paying teller of a national banking association, organized and existing under and by virtue of the laws of the said United States, to wit, the Second National Bank of Toledo, did unlawfully and feloniously, wilfully and with intent to deceive the president and directors of the said banking association and any agent appointed to examine the affairs of said banking association, and with intent to defraud and injure said banking association, make a certain false entry on the paying teller's daily cash sheet for cage number twelve (12) of the said banking association, for the said 20th day of July, in the year of our Lord nineteen hundred and fourteen, in this, to-wit: that among the entries of currency upon said sheet he added the sum of four thousand seven hundred dollars ($4,700.00) to the various other amounts of currency and coin entered upon said sheet, whereas in truth and in fact, the said sum of four thousand seven hundred dollars ($4,700.00) so entered and reported was four thousand seven hundred dollars ($4,700.00) in excess of the true amount of money which should have appeared upon said sheet and which was then and there in his possession as assistant cashier and head paying teller in charge of cage

number twelve (12) of said banking association; contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

JOHN S. PRATT,
Assistant United States Attorney.

(Endorsement): No. 1558. District Court of the United States for the Western Division of the Northern District of Ohio. The United States *vs.* James J. Henahan. Indictment for embezzlement and making false entries on national banking association records. Sec. 5209, R. S. A true bill, Will F. Broer, Foreman of Grand Jury. Filed Mar. 5, 1915, at o'clock M. B. C. Miller, Clerk, U. S. District Court, N. D. O. John S. Pratt, Asst. U. S. District Attorney.

October Term, A. D. 1914, to wit: March 15, 1915.

Present: Honorable John M. Killits, U. S. District Judge.

THE UNITED STATES
vs
JAMES J. HENAHAN. } Criminal. No. 1558.

This day came the United States Attorney on behalf of the United States and came also the defendant accompanied by counsel, and being arraigned, and waiving the reading of the indictment herein, he for plea thereto says he is guilty as he is therein and thereby charged.

And the Court having inquired of the defendant if he had anything to say why sentence should not be pronounced upon him, and having received his reply thereto,

It is thereupon ordered that said defendant be imprisoned in the penitentiary at Leavenworth, Kansas, for a period of five (5) years, and that he pay the costs of this prosecution taxed at $———.

October Term, A. D. 1914, to wit: March 15, 1915.

Present: Honorable John M. Killits, U. S. District Judge.

THE UNITED STATES
vs
JAMES J. HENAHAN. } Criminal. No. 1558.

The defendant being before the court under sentence heretofore imposed upon him herein, it is now on his application, ordered that the execution of the sentence be, and it is hereby suspended during the good behavior of the defendant, and for the purpose of this case this term of this court is kept open for five years; to which order of the court in suspending said sentence the United States Attorney objects, for the reason that the court has no jurisdiction to suspend the execution of said sentence, and excepts to the order suspending the sentence.

IN THE DISTRICT COURT OF THE UNITED STATES NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

THE UNITED STATES
vs.
JAMES J. HENAHAN. } Motion.

Now comes the United States by Edwin S. Wertz, United States Attorney for the Northern District of Ohio, and moves the Court to vacate the order of the

court heretofore entered herein, wherein the court attempts to suspend the execution of the sentence of imprisonment imposed upon the defendant James J. Henahan, for the following reasons, to-wit:

1. That the said suspension was not for the purpose of preventing an abuse of the court's process or to prevent an injustice being done the defendant;

2. That the court had no authority or jurisdiction to enter said order of suspension;

3. That said order of suspension was and is illegal and void;

4. That when the order was entered attempting to suspend the execution of the sentence of imprisonment, there were no proceedings pending for a review of the said judgment, and nothing requiring further action by the court making the order was necessary before the said judgment should become final.

E. S. WERTZ,
United States Attorney.
JOHN S. PRATT,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

(Endorsement:) No. 1558. In the District Court of U. S. Northern District of Ohio, Western Division. The United States *vs* James J. Henahan. Motion. E. S. Wertz, United States Attorney, J. S. Pratt, Assistant U. S. Attorney. Filed Mar. 25, 1915. At o'clock M. B. C. Miller, Clerk, U. S. District Court, N. D. O.

October Term, A. D. 1914, to-wit: April 9, 1915.

Present: Honorable John M. Killits, U. S. District Judge.

The UNITED STATES
vs.
JAMES J. HENAHAN. } Criminal. No. 1558.

This day this cause came on to be heard on the motion of the United States, Plaintiff, to vacate the order of the court suspending the execution of the sentence imposed upon the defendant.

The court finds that when the order was entered to suspend the execution of the sentence of imprisonment, there were no proceedings pending for a review of the said judgment, and nothing requiring further action by the court making the order was necessary before the said judgment should become final, except such as might arise under said order of suspension, and the said motion having been argued by counsel and submitted to the court, and the court now being fully advised in the premises finds that said motion is not well taken and should be overruled, for facts and reasons which the Court sets out in the opinion filed herewith.

It is therefore ordered that the said motion be, and the same is hereby overruled, to which order of the court in overruling the said motion, the United States Attorney in behalf of the United States excepts.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

THE UNITED STATES
vs.
JAMES J. HENAHAN. } Præcipe.

To the clerk of the above entitled court:

You will please prepare and issue forthwith an order of commitment for James J. Henahan, in accordance with the judgment of the court heretofore entered by the Honorable John M. Killits, Judge of this court, in the above entitled cause, by which judgment the defendant, James J. Henahan was ordered to be imprisoned for a period of five years in the penitentiary at Leavenworth, Kansas, said order of commitment to be prepared as required by law and the rules of this court.

E. S. WERTZ,
United States Attorney.
JOHN S. PRATT,
Assistant U. S. Attorney.

(Endorsement:) No. 1558. In the District Court of U. S. Northern District of Ohio, Western Division. The United States vs. James J. Henahan. Præcipe. Filed Apr. 9, 1915, At o'clock M. B. C. Miller, Clerk, U. S. District Court N. D. O. E. S. Wertz, United States Attorney.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

THE UNITED STATES *vs* JAMES J. HENAHAN. } Refusal of clerk to issue order of commitment.

To E. S. WERTZ,
United States Attorney for the Northern District of Ohio:

I hereby refuse to issue order of commitment for James J. Henahan in the above entitled cause, as requested by you in your præcipe filed herein, for the reason that the sentence pronounced by the Honorable John M. Killits, Judge of this court, by the terms of which the said James J. Henahan was sentenced to five years imprisonment in the penitentiary at Leavenworth, Kansas, has been suspended by the terms of the following order made in the above entitled cause:

The defendant being before the court under sentence heretofore imposed upon him herein, it is now on his application, ordered that the execution of the sentence be, and it is hereby suspended during the good behavior of the defendant and for the purpose of this case this term of this court is kept open for five years; to which order of the court in suspending said sentence the United States Attorney objects, for the reason that the court has no jurisdiction to suspend the execution of said sentence, and excepts to the order suspending the sentence.

B. C. MILLER,
Clerk U. S. District Court,
By J. W. WILSON,
Deputy Clerk.

APR. 9, 1915.

(Endorsement:) No. 1558. In the District Court of U. S., Northern District of Ohio, Western division. The United States *vs* James J. Henahan. Copy of Refusal Clerk to issue order of Commitment. Filed Apr. 9, 1915. At o'clock M. B. C. Miller, Clerk, U. S. District Court, N. D. O.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION.

THE UNITED STATES
vs.
JAMES J. HENAHAN. } Motion.

Now comes the United States, by Edwin S. Wertz, United States Attorney for the Northern District of Ohio, and moves the court for execution of the judgment rendered against the defendant James J. Henahan, whereby the said defendant was ordered to be imprisoned for a period of Five (5) years in the penitentiary at Leavenworth, Kansas, and for an order directing the clerk of this court to forthwith issue commitment upon the said judgment and sentence for the reasons towit:

1. That the order of the court entered subsequently to the entry of judgment whereby the court attempted to suspend the execution of said judgment was and is illegal and void;

2. That the court has no authority or jurisdiction to enter said order of suspension.

3. That the said suspension was not for the purpose of preventing an abuse of the Court's process or to prevent an injustice being done the said defendant;

4. That when the order was entered attempting to suspend the execution of the sentence of imprisonment, there were no proceedings pending for a review of the said judgment, and nothing requiring further action by the court making the order, was necessary, before the said judgment should become final.

5. That the clerk because of said suspension order has refused and will continue to refuse, to comply with the praecipe filed in his office in said cause on behalf of the United States calling for the issuance forthwith of said commitment.

E. S. WERTZ,
United States Attorney,
JOHN S. PRATT,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

(Endorsement:) No. 1558. In the District Court of U. S. Northern District of Ohio, Western Division. The United States *vs* James J. Henahan. Motion. E. S. Wertz, United States Attorney, J. S. Pratt, Assistant U. S. Attorney. Filed Apr. 9, 1915, At o'clock M. B. C. Miller, Clerk, U. S. District Court, N. D. O.

October Term, A. D. 1914, to-wit: April 9, 1915.

Present: Honorable John M. Killits, U. S. District Judge.

THE UNITED STATES
vs
JAMES J. HENAHAN.
} Criminal. No. 1558.

This day this cause came on to be heard on the motion of the United States, Plaintiff, for execution of the judgment rendered against the defendant,

James J. Henahan, whereby the said defendant was ordered to be imprisoned for a period of five years in the penitentiary at Leavenworth, Kansas. The Court finds that when the order was entered to suspend the execution of the sentence of imprisonment, there were no proceedings pending for a review of the said judgment, and nothing requiring further action by the court making the order, was necessary, before the said judgment should become final, except such as might arise under said order of suspension, and that the clerk, because of said suspension order has refused, and will continue to refuse to comply with the praecipe filed in his office in this cause, in behalf of the United States, calling for the issuance forthwith of said commitment, and the said motion having been argued by counsel and submitted to the court, and the court being now fully advised in the premises finds that when the order suspending the execution of the sentence of imprisonment was made, there were no proceedings pending for a review of the said judgment, and there was nothing necessary requiring further action by the court making the order before the said judgment should become final, except such as might arise under said order of suspension.

The court further finds that the United States, Plaintiff, through its attorney, E. S. Wertz, has filed in the office of the Clerk of this court, a praecipe requiring said clerk to prepare and issue forthwith an order of commitment as required by law and under the rules of this court, and the court further finds that the said Clerk of this Court, because of the suspension order made by this Court, has refused, and will continue to refuse to comply with the said praecipe filed in his office in said cause in behalf of

the United States, calling for the issuance forthwith of said commitment.

The court further finds because of the findings of the court in an opinion herewith filed, that the said motion is not well taken and should be overruled.

It is therefore ordered that the said motion be, and the same is hereby overruled, to which order of the court in overruling said motion the United States Attorney in behalf of the United States excepts.

IN THE DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

UNITED STATES
vs.
JAMES J. HENAHAN.

KILLITS, J.:

The district attorney, by motion, asks the court to vacate an order made at this term suspending the execution of the sentence of imprisonment imposed upon the defendant.

It is proper that the court at this time should state its reasons, first, for attempting to suspend the execution of the sentence of imprisonment, and for now refusing the motion to vacate such order.

We find that for a great many years judges of this court have exercised, without question, the discretion both to suspend the execution of sentence already imposed, or to pass a criminal case after conviction indefinitely, at the discretion of the court, for sentence. The action of the court in this case was no innovation in a well recognized practice, not only in

the federal courts of Ohio, but, sustained by specific opinion of the Supreme Court of Ohio as applied to the discretionary power of the state court.

Without enlarging by reference to authority upon the right of the court to suspend the execution of sentence, we observe that there seems to be no question but that such discretion abided in common law courts in England and America at the time of the adoption of the Federal Constitution. Our criminal practice conforms to the common law practice obtaining in 1787, so far as it has not been changed by specific statutory provisions. No attempt by Congress has been made to change the relation of the court to this proposition, as it existed when the Constitution was adopted. Some anachronisms still remain to distinguish our criminal procedure from that of the States, due to the fact that the common law of the eighteenth century still controls us. For examples, a wife may not testify, nor is a convicted man competent as a witness.

Modern notions respecting the treatment of law breakers abandon the theory that the imposition of the sentence is solely to punish, and now the best thought considers three elements properly to enter into the treatment of every criminal case after conviction. Punishment in some measure is still the object of sentence, but affecting its extent and character we consider the effect of the situation upon the individual as tending to reform him from or to confirm him in a criminal career, and also the relation his case bears to the community in the effect of the disposition of it upon others of criminal tendencies.

It seems to the court that no person is better able to determine just what proportionate effect should be given to each of these three elements now entering into the passing of a judgment upon conviction than

the judge who has observed the defendant, has given some consideration to the effect of arrest and conviction upon his character, knows his domestic and social surroundings, and the community in which his crime was committed. We have become impressed with the thought that no discretionary power more valuable than this is held by the judge of a court of this jurisdiction, and our experience in its exercise but convinces the court of its value to society as well as to the individual who benefits by it.

Passing now to the concrete case, we observe for the benefit of the United States that nothing exists in this case which moved the court to suspend the execution of sentence to prevent "an abuse of the court's process, or to prevent an injustice being done to the defendant" so far as it may be said that abstract justice required defendant to suffer for his crime. However, we considered the defendant from many standpoints to be as worthy of the benefit of the discretion to suspend the execution of his sentence as any other convict upon whom that favor has hitherto been bestowed. We took into account the peculiar circumstances under which his crime was committed, having regard to the temptations which from time to time encompassed him, and his personal necessities, and the purposes for which his appropriations were made. Also, the fact that his friends made his employers whole, and that otherwise he had so commended himself to the favor of his employers suffering by his crime, that they at all times as well as now evince a disposition to forgive his abuse of their confidence, and to support him against the punishment which the law provides. We find that otherwise than for this crime, his disposition, character and habits have so strongly commended him to his friends, acquaintances and per-

sons of his faith, that they are unanimous in the belief that the exposure and humiliation of his conviction are a sufficient punishment, and that he can be saved to the good of society if nothing further is done with him. These people are law abiding citizens with as keen a desire to uphold and vindicate the law as any other citizens of the community.

All the surroundings of the defendant, including what we were able to judge of his disposition and purposes, impressed the court with the feeling that it were much better for him, as a component of society, to remain at large under the court's parole in an attempt to rehabilitate himself, than to send him into the term of imprisonment which the law provided, and which, if served, might very readily tend to diminish his usefulness to society.

If his case is to be used, as of course it may be used with the utmost propriety, as a test of the question whether a discretion of this sort abides with the court, we wish it to be understood that in the court's opinion, after a full study of all the circumstances surrounding the case, the defendant is fully worthy of the exercise of the discretion, should the court's power in the premises be sustained.

The court's judgment in this matter is supported by that of substantial citizens who recommend a pardon to the young man, with an application in that behalf pending.

JOHN M. KILLITS, *Judge.*

(Endorsement:) No. 1558. United States District Court, Northern District of Ohio, Western Division. United States *vs.* James J. Henahan. Original. Opinion. Filed Apr. 9, 1915, At o'clock M. B. C. Miller, Clerk, U. S. District Court, N. D. O.

October Term, A. D. 1914, to-wit: April 22, 1915.

Present: Honorable John M. Killits, U. S. District Judge.

THE UNITED STATES
vs.
JAMES J. HENAHAN. } Criminal. No. 1558.

This day came the United States Attorney and presented to the Court the Bill of Exceptions of the United States and prayed that the same be allowed, signed and made a part of the record herein, and the said Bill of Exceptions having been examined by the Court, it is found to be in all respects true and correct and same is hereby settled and allowed, and made a part of the record in this cause.

THE UNITED STATES OF AMERICA
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION.

I, B. C. Miller, Clerk of the District Court of the United States for the Division and District aforesaid, do hereby certify that the annexed and foregoing is a true and complete copy of the Indictment filed March 5, 1915; Order of sentence, and Order suspending sentence, entered March 15, 1915; Motion to vacate order suspending sentence, filed March 25, 1915; Order overruling motion to vacate order of suspension, entered April 9, 1915; Refusal of Clerk to issue order of commitment, filed April 9, 1915; Motion for execution of judgment, filed April 9, 1915; Order overruling motion for execution of judgment, entered April 9, 1915; Opinion, filed April 9, 1915, and order allowing Bill of Exceptions, entered April 22, 1915, in the therein entitled cause, on the dates aforesaid.

Witness, my official signature and the seal of said court, at Toledo, in said District, this 23rd day of April, A. D. 1915, and in the 139th year of the Independence of the United States of America.

B. C. MILLER, *Clerk*,

(SEAL) By J. W. WILSON,

Deputy Clerk.

EXHIBIT "B"

Bill of exceptions.

IN THE DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

THE UNITED STATES OF AMERICA,
vs
JAMES J. HENAHAN, Defendant. } Criminal No. 1558.

BILL OF EXCEPTIONS.

Appearances:

For the Government: Edwin S. Wertz, Esq., United States Attorney, John S. Pratt, Esq., Assistant United States Attorney.

For the Defendant: E. J. Marshall, Esq.

Be it remembered, That in the above entitled cause in this court the following proceedings were had at the October, 1914, term of this court, to-wit:

On the 5th day of March, 1915, an indictment was returned into court by the grand jurors, in the words and figures following, to-wit:

INDICTMENT.

THE UNITED STATES OF AMERICA NORTHERN DISTRICT OF OHIO WESTERN DIVISION. Ss. } No. 1558. Criminal.

In the District Court of the United States, within and for the Division and District aforesaid.

At the October Term of said Court, in the year of Our Lord one thousand nine hundred and fourteen.

The Grand Jurors of the United States of America, duly impaneled, sworn and charged to inquire of crimes and offenses within and for the body of the Western Division of the Northern District of Ohio, upon their oath present and find that

Sec. 5209 R. S.] JAMES J. HENAHAN,

late of the Division and District aforesaid, heretofore, to-wit, on or about the 13th day of June, in the year of our Lord one thousand nine hundred and fourteen, at Toledo, in the County of Lucas, in the Division and District aforesaid, and within the jurisdiction of this court, being then and there assistant cashier and head paying teller of a national banking association, organized and existing under and by virtue of the laws of the said United States, to-wit, the Second National Bank of Toledo, did, by virtue of his said office as assistant cashier and head paying teller, and while he was employed therein, have in his possession and custody divers moneys and funds of the value of three thousand dollars ($3,000.00) of the moneys and funds of the said banking association, and the said James J. Henahan, then and there having in his possession as assistant cashier and head paying teller the said moneys and funds of said banking association, then and there unlawfully, knowingly and feloniously did embezzle and abstract from the said banking association the said sum of three thousand dollars ($3,000.00) as aforesaid, with intent to injure and defraud the said banking association; contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

COUNT 2.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and find that the said

heretofore, to-wit, on or about the 20th day of July, in the year of Our Lord nineteen hundred and fourteen, at Toledo, in the County of Lucas, in the Division and District aforesaid, and within the jurisdiction of this court, being then and there assistant cashier and head paying teller of a national banking association, organized and existing under and by virtue of the laws of the said United States, to-wit: the Second National Bank of Toledo, did, by virtue of his said office as assistant cashier and head paying teller, and while he was employed therein, have in his possession and custody divers moneys and funds of the value of one thousand seven hundred dollars ($1700.00) of the moneys and funds of the said banking association, and the same James J. Henehan, then and there having in his possession as assistant cashier and head paying teller the said moneys and funds of said banking association, then and there unlawfully, knowingly and feloniously did embezzle and abstract from the said banking association the said sum of one thousand seven hundred dollars, as aforesaid, with intent to injure and defraud the said banking association; contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

COUNT 3.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and find that the said

Sec. 5209 R. S.] JAMES J. HENEHAN

heretofore, towit, on or about the 13th day of June, in the year of our Lord nineteen hundred and fourteen, at Toledo, in the County of Lucas, in the Division and District aforesaid, and within the jurisdiction of this court, being then and there assistant cashier and head paying teller of a national banking association, organized and existing under and by virtue of the laws of the said United States, to wit, the Second National Bank of Toledo, did unlawfully and feloniously, wilfully and with intent to deceive the president and directors of the said banking association and any agent appointed to examine the affairs of the said banking association, and with intent to defraud and injure said banking association, make a certain false entry in a certain report and statement of the said banking association, said report and statement being a debit slip and the original entry of the matters thereon contained, and being then and there used for the purpose of entering upon the general ledger of said banking association the matters thereon contained, which said false entry was false in this, towit, that upon said debit slip the said James J. Henehan then and there entered the words and figures, "Mut. cy. a/c $11500.00," meaning and intending to convey to the officers and bookkeepers of said banking association that the sum of eleven thousand five hundred dollars ($11,500.00) in mutilated currency had been by the said James J. Henehan shipped to the Treasurer of the United States,

and that said amount of eleven thousand five hundred dollars ($11,500.00) should be charged on the general ledger of said banking association against the mutilated currency account; whereas, in truth and in fact, the said James J. Henehan had shipped the sum of eight thousand five hundred dollars ($8,500.00) only in mutilated currency to the Treasurer of the United States, and that said debit slip was false in the amount of money written thereon; he, the said James J. Henehan, intending thereby then and there, at the time and place of so making said false entry, to injure and defraud the said Second National Bank and to deceive the officers of said banking association and any agent appointed to examine the affairs of said banking association; contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

COUNT 4.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and find that the said

heretofore, towit, on or about July 20th, in the year of Our Lord one thousand nine hundred and fourteen, at Toledo in the County of Lucas, in the Division and District aforesaid, and within the jurisdiction of this court, being then and there assistant cashier and head paying teller of a national banking association, organized and existing under and by virtue of the laws of the said United States, to-wit, the Second National Bank of Toledo, did unlawfully and feloniously, wilfully and with intent to deceive the president and directors of the said banking association and any

agent appointed to examine the affairs of said banking association, and with intent to defraud and injure said banking association, make a certain false entry on the paying teller's daily cash sheet for cage number twelve (12) of the said banking association, for the said 20th day of July, in the year of Our Lord nineteen hundred and fourteen, in this, to wit, that among the entries of currency upon said sheet he added the sum of four thousand seven hundred dollars ($4,700.00) to the various other amounts of currency and coin entered upon said sheet, whereas, in truth and in fact the said sum of four thousand seven hundred dollars ($4,700) so entered and reported was four thousand seven hundred dollars ($4,700.00) in excess of the true amount of money which should have appeared upon said sheet and which was then and there in his possession as assistant cashier and head paying teller in charge of cage number twelve (12) of said banking association; contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

JOHN S. PRATT,
Asst. United States Atty.

(Endorsement:) No. 1558. District Court of the United States for the Western Division of the Northern District of Ohio. The United States *vs.* James J. Henehan. Indictment for embezzlement and making false entries on national banking association records. Sec. 5209 R. S. A True Bill, Will F. Broer, Foreman of Grand Jury. Filed Mar. 5, 1915, at o'clock M B. C. Miller, Clerk U. S. District Court, N. D. O. John S. Pratt, Asst. U. S. District Attorney.

On the 15th day of March, 1915, the following proceedings were had in said cause, as appears by the journal of the court, to-wit:

THE UNITED STATES,
vs.
JAMES J. HENEHAN. } Criminal. No. 1558.

This day came the United States Attorney on behalf of the United States, and came also the defendant accompanied by counsel, and being arraigned, and waiving the reading of the indictment herein, he for plea thereto says he is guilty as he is therein and thereby charged.

And the Court having inquired of the defendant if he had anything to say why sentence should not be pronounced upon him, and having received his reply thereto,

It is thereupon ordered that said defendant be imprisoned in the penitentiary at Leavenworth, Kansas, for a period of five (5) years, and that he pay the costs of this prosecution taxed at $———.

THE UNITED STATES,
vs.
JAMES J. HENEHAN. } Criminal. No. 1558.

The defendant being before the court under sentence heretofore imposed upon him herein, it is now on his application, ordered that the execution of the sentence be, and it is hereby suspended during the good behavior of the defendant, and for the purpose of this case this term of this court is kept open for five years; to which order of the court in suspending said sentence the United States Attorney objects, for the reason that the court has no jurisdiction to suspend the execution of said sentence, and excepts to the order suspending the sentence.

On the 25th day of March, 1915, there was filed in this cause a motion by the United States as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION.

THE UNITED STATES
vs.
JAMES J. HENAHAN } Motion.

Now comes the United States, by Edwin S. Wertz, United States Attorney for the Northern District of Ohio, and moves the Court to vacate the order of the court heretofore entered herein, wherein the court attempts to suspend the execution of the sentence of imprisonment imposed upon the defendant James J. Henahan, for the following reasons, towit:

1. That the said suspension was not for the purpose of preventing an abuse of the court's process or to prevent an injustice being done the defendant;

2. That the court had no authority or jurisdiction to enter said order of suspension;

3. That said order of suspension was and is illegal and void;

4. That when the order was entered attempting to suspend the execution of the sentence of imprisonment, there were no proceedings pending for a review of the said judgment, and nothing requiring further action by the court making the order was necessary before the said judgment should become final.

E. S. WERTZ,
United States Attorney.
JOHN S. PRATT,
Assistant U. S. Attorney.
Attorneys for Plaintiff.

On the 9th day of April, 1915, the following proceedings were had in said cause, as appears by the journal of the court, to-wit:

THE UNITED STATES,
vs
JAMES J. HENAHAN.
} Criminal. No. 1558.

This day this cause came on to be heard on the motion of the United States, Plaintiff, to vacate the order of the court suspending the execution of the sentence imposed upon the defendant.

The court finds that when the order was entered to suspend the execution of the sentence of imprisonment, there were no proceedings pending for a review of the said judgment, and nothing requiring further action by the court making the order was necessary before the said judgment should become final, except such as might arise under said order of suspension, and the said motion having been argued by counsel and submitted to the court, and the court now being fully advised in the premises finds that said motion is not well taken and should be overruled, for facts and reasons which the Court sets out in the opinion filed herewith.

It is therefore ordered that the said motion be, and the same is hereby overruled, to which order of the court in overruling the said motion, the United States Attorney in behalf of the United States excepts.

Thereupon, on the said 9th day of April, 1915, after the court had entered the order overruling the said motion to vacate the order of the court suspending the execution of the sentence imposed upon the defendant, the United States, by its attorneys, filed

with the clerk a praecipe in the words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION.

THE UNITED STATES
vs.
JAMES J. HENAHAN } Praecipe

To the clerk of the above entitled court:

You will please prepare and issue forthwith an order of commitment for James J. Henahan, in accordance with the judgment of the court heretofore entered by the Honorable John M. Killits, Judge of this court, in the above entitled cause, by which judgment the defendant, James J. Henahan was ordered to be imprisoned for a period of five years in the penitentiary at Leavenworth, Kansas, said order of commitment to be prepared as required by law and the rules of this court.

E. S. WERTZ,
United States Attorney.
JOHN S. PRATT,
Assistant U. S. Attorney.

And on the same day the clerk of said court refused to comply with the foregoing praecipe requesting him to issue an order of commitment for the defendant, James J. Henahan, and handed to the United States attorney his written refusal so to do, in the words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION.

THE UNITED STATES *vs* JAMES J. HENAHAN. } Refusal of clerk to issue order of commitment.

To E. S. WERTZ,
United States Attorney for the
Northern District of Ohio:

I hereby refuse to issue order of commitment for James J. Henahan in the above entitled cause, as requested by you in your praecipe filed herein, for the reason that the sentence pronounced by the Honorable John M. Killits, Judge of this court, by the terms of which the said James J. Henahan was sentenced to five years imprisonment in the penitentiary at Leavenworth, Kansas, has been suspended by the terms of the following order made in the above entitled cause:

"The defendant being before the court under sentence heretofore imposed upon him herein, it is now on his application, ordered that the execution of the sentence be, and it is hereby suspended during the good behavior of the defendant, and for the purpose of this case this term of this court is kept open for five years; to which order of the court in suspending said sentence the United States Attorney objects, for the reason that the court has no jurisdiction to suspend the execution of said sentence, and excepts to the order suspending the sentence."

B. C. MILLER,
Clerk, U. S. District Court,
By J. W. WILSON,
Deputy Clerk.

APR. 9, 1915.

On the same day, to-wit, April 9, 1915, and after the refusal by the clerk to issue said commitment in compliance with said præcipe, there was filed in this cause by the United States, through its attorneys, a motion in the words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION.

THE UNITED STATES
vs.
JAMES J. HENAHAN } Motion.

Now comes the United States, by Edwin S. Wertz, United States Attorney for the Northern District of Ohio, and moves the court for execution of the judgment rendered against the defendant James J. Henahan, whereby the said defendant was ordered to be imprisoned for a period of Five (5) years in the penitentiary at Leavenworth, Kansas, and for an order directing the clerk of this court to forthwith issue commitment upon the said judgment and sentence for the reasons, towit:

1. That the order of the court entered subsequently to the entry of judgment whereby the court attempted to suspend the execution of said judgment was and is illegal and void;

2. That the court has no authority or jurisdiction to enter said order of suspension;

3. That the said suspension was not for the purpose of preventing an abuse of the Court's process or to prevent an injustice being done the said defendant.

4. That when the order was entered attempting to suspend the execution of the sentence of imprisonment, there were no proceedings pending for a review

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of the said judgment, and nothing requiring further action by the court making the order, was necessary, before the said judgment should become final.

5. That the clerk because of said suspension order has refused and will continue to refuse, to comply with the praecipe filed in his office in said cause on behalf of the United States calling for the issuance forthwith of said commitment.

E. S. WERTZ,
United States Attorney.
JOHN S. PRATT,
Assistant U. S. Attorney.
Attorneys for Plaintiff.

On said April 9, 1915, the further proceedings were had in said cause as appear by the journal of the court to-wit:

THE UNITED STATES,
vs
JAMES J. HENAHAN,
} Criminal. No. 1558.

This day this cause came on to be heard on the motion of the United States, Plaintiff, for execution of the judgment rendered against the defendant, James J. Henahan, whereby the said defendant was ordered to be imprisoned for a period of five years in the penitentiary at Leavenworth, Kansas. The Court finds that when the order was entered to suspend the execution of the sentence of imprisonment, there were no proceedings pending for a review of the said judgment, and nothing requiring further action by the court making the order was necessary, before the said judgment should become final, except such as might arise under said order of suspension, and that the clerk, because of said suspension order,

has refused and will continue to refuse to comply with the praecipe filed in his office in this cause, in behalf oi the United States, calling for the issuance forthwith of said commitment, and the said motion having been argued by counsel and submitted to the court, and the court being now fully advised in the premises finds that when the order suspending the execution of the sentence of imprisonment was made there were no proceedings pending for a review of the said judgment, and there was nothing necessary requiring further action by the court making the order before the said judgment should become final, except such as might arise under said order of suspension.

The court further finds that the United States, Plaintiff, through its attorney, E. S. Wertz, has filed in the office of the Clerk of this court, a praecipe requiring said clerk to prepare and issue forthwith an order of commitment as required by law and under the rules of this court, and the court further finds that the said clerk of this court has refused, and will continue to refuse, to comply with the said praecipe filed in his office in said cause in behalf of the United States, calling for the issuance forthwith of said commitment.

The court further finds because of the findings of the court in an opinion filed herewith, that the said motion is not well taken and should be overruled.

It is therefore ordered that the said motion be, and the same is hereby overruled, to which order of the court in overruling said motion the United States Attorney in behalf of the United States excepts.

And thereupon, and upon said 9th day of April, 1915, and in connection with the orders of the court overruling the government's motion to vacate the order of suspension of sentence herein, and overruling

the motion of the government for execution of the sentence, the court filed his written opinion, in the words following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

UNITED STATES
vs.
JAMES J. HENAHAN.

KILLITS, J.:

The district attorney, by motion, asks the court to vacate an order made at this term suspending the execution of the sentence of imprisonment imposed upon the defendant.

It is proper that the court at this time should state its reasons, first, for attempting to suspend the execution of the sentence of imprisonment, and for now refusing the motion to vacate such order.

We find that for a great many years judges of this court have exercised, without question, the discretion both to suspend the execution of sentence already imposed, or to pass a criminal case after conviction indefinitely, at the discretion of the court, for sentence. The action of the court in this case was no innovation in a well recognized practice, not only in the federal courts of Ohio, but, sustained by specific opinion of the Supreme Court of Ohio as applied to the discretionary power of the state court.

Without enlarging by reference to authority upon the right of the court to suspend the execution of sentence, we observe that there seems to be no question but that such discretion abided in common law

courts in England and America at the time of the adoption of the Federal Constitution. Our criminal practice conforms to the common law practice obtaining in 1787, so far as it has not been changed by specific statutory provisions. No attempt by Congress has been made to change the relation of the court to this proposition, as it existed when the Constitution was adopted. Some anachronisms still remain to distinguish our criminal procedure from that of the States, due to the fact that the common law of the eighteenth century still controls us. For examples, a wife may not testify, nor is a convicted man competent as a witness.

Modern notions respecting the treatment of law breakers abandon the theory that the imposition of the sentence is solely to punish, and now the best thought considers three elements properly to enter into the treatment of every criminal case after conviction. Punishment in some measure is still the object of sentence, but affecting its extent and character we consider the effect of the situation upon the individual as tending to reform him from or to confirm him in a criminal career, and also the relation his case bears to the community in the effect of the disposition of it upon others of criminal tendencies.

It seems to the court that no person is better able to determine just what proportionate effect should be given to each of these three elements now entering into the passing of a judgment upon conviction than the judge who has observed the defendant, has given some consideration to the effect of arrest and conviction upon his character, knows his domestic and social surroundings, and the community in which his crime was committed. We have become

impressed with the thought that no discretionary power more valuable than this is held by the judge of a court of this jurisdiction, and our experience in its exercise but convinces the court of its value to society as well as to the individual who benefits by it.

Passing now to the concrete case, we observe for the benefit of the United States that nothing exists in this case which moved the court to suspend the execution of sentence to prevent "an abuse of the court's process, or to prevent an injustice being done to the defendant," so far as it may be said that abstract justice required defendant to suffer for his crime. However, we considered the defendant from many standpoints to be as worthy of the benefit of the discretion to suspend the execution of his sentence as any other convict upon whom that favor has hitherto been bestowed. We took into account the peculiar circumstances under which his crime was committed, having regard to the temptations which from time to time encompassed him, and his personal necessities, and the purpose for which his appropriations were made. Also, the fact that his friends made his employers whole, and that otherwise he had so commended himself to the favor of his employers suffering by his crime, that they at all times as well as now evince a disposition to forgive his abuse of their confidence, and to support him against the punishment which the law provides. We find that otherwise than for this crime, his disposition, character and habits have so strongly commended him to his friends, acquaintances and persons of his faith, that they are unanimous in the belief that the exposure and humiliation of his conviction are a sufficient punishment, and

that he can be saved to the good of society if nothing further is done with him. These people are law abiding citizens with as keen a desire to uphold and vindicate the law as any other citizens of the community.

All the surroundings of the defendant, including what we were able to judge of his disposition and purposes, impressed the court with the feeling that it were much better for him, as a component of society, to remain at large under the court's parole in an attempt to rehabilitate himself, than to send him into the term of imprisonment which the law provided, and which, if served, might very readily tend to diminish his usefulness to society.

If his case is to be used, as of course it may be used with the utmost propriety, as a test of the question whether a discretion of this sort abides with the court, we wish it to be understood that in the court's opinion, after a full study of all the circumstances surrounding the case, the defendant is fully worthy of the exercise of the discretion, should the court's power in the premises be sustained.

The court's judgment in this matter is supported by that of substantial citizens who recommend a pardon to the young man, with an application in that behalf pending.

The foregoing are all the proceedings had in this cause.

Thereupon came the United States of America, by Edwin S. Wertz, United States Attorney for the Northern District of Ohio, and John S. Pratt, Assistant United States Attorney for the Northern District of Ohio, and presented and submitted this its bill of exceptions and prayed that the same be allowed,

signed and sealed, and made part of the record; and the said bill of exceptions having been found by the court to be in all respects full, true and correct, the same is hereby settled, allowed, signed and sealed, and made a part of the record in this cause on this 21st day of April, A. D. 1915.

JOHN M. KILLITS,
Judge.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

No. ———, ORIGINAL.

EX PARTE THE UNITED STATES, PETITIONER.

PETITION FOR MANDAMUS.

BRIEF ON BEHALF OF THE PETITIONER.

I.

The Court had no Power to Enter the Order Suspending Indefinitely the Execution of the Judgment.

It is admitted that there is no Federal statute conferring this power on the United States courts. The argument, therefore, must be and is that the power is inherent in all courts. The common law, however, did not know of any such power, as appears from the following correct statement in the opinion of the Supreme Court of Mississippi in *Fuller* v. *The State*, 57 Southern Rep. 806, 807:

> At common law, while a judgment remained unreversed, there were only two methods by which its execution could be stayed or prevented: First, by a reprieve, which merely

delayed the execution of the sentence; second, by a pardon, which operated as an absolute bar to its execution. The power to pardon was never claimed or exercised by the courts, and will not be further considered here. Reprieves were of three kinds: First, ex mandatio regis; second, ex arbitrio judicis; third, ex necessitate legis. The first and third kinds of reprieves have no relevancy here, and we may dismiss them from further consideration. Reprieves ex arbitrio judicis, or discretionary reprieves, were granted by the courts only in exceptional cases, to prevent abuses of their process, and to prevent irreparable injustice from being done to defendants. Some of the circumstances under which this power was exercised were as follows: "Where the defendant pleads a pardon, which, though defective in point of form, sufficiently manifests the intention of the Crown to remit the sentence where it seems doubtful whether the offense is included in some general act of grace or whether it amounts to so high a crime as that charged in the indictment. The judge sometimes also allows it before judgment, or at least intimates his intention to do so, as when he is not satisfied with the verdict and entertains doubt as to the prisoner's guilt, or when a doubt arises, if the crime be not within clergy, or when, from some favorable circumstances, he intends to recommend the prisoner to mercy." 2 Hawkins, Pleas of the Crown, 657; 2 Hale, Pleas of the Crown, 412; 1 Chitty's Crim. Law, 757; Archbold's Crim. Plead. & Prac.,

206; 4 Blackstone, 394. This right of the court did not rest on any express authority or recognized principle, but stood alone on ancient usage. 2 Dyer, 205 (807).

Whether such an inherent power exists or not was mooted but not decided in *Pointer* v. *United States*, 151 U. S. 396, 419. But in *United States* v. *Wilson*, 46 Fed. 748 (C. C. District Idaho), it was held that a Federal court had no power to suspend the pronouncement of a sentence; and in *In re James Adams* (——— ———), decided by the District Court for the District of Kansas on October 29, 1914, it was specifically held that a Federal court has no power to suspend the execution of a sentence.

While there is some conflict of authority upon the point in the State courts, it is submitted that the great weight of authority and the better reasoned view is against the existence of any such inherent power in the courts. The following cases to that effect are referred to:

Fuller v. *State, supra;*
In re Webb, 89 Wis. 354;
Spencer v. *The State*, 140 So. Western (Tenn.) 597;
People v. *Barrett*, 202 Ill. 287;
People v. *Brown*, 54 Mich. 15;
People v. *Felker*, 61 Mich. 110;
Neal v. *The State*, 104 Ga. 509;
In re Flint, 25 Utah, 338;
Ex parte Peterson, 113 Pac. 729 (Ida.);
State v. *Abbott*, 70 So. Eastern, 6 (S. C.);
Ex parte Clendenning, 22 Okla. 108;

In re Strickler, 51 Kans. 700;
State v. *Boss*, 80 Iowa, 467;
Daniels v. *Persons*, 137 Ga. 826;
Ex parte Bugg, 145 So. Western, 831 (Mo. App.);
Republic of Hawaii v. *Pedro*, 11 Ha. 287;
Gray v. *The State*, 107 Ind. 177;
In re Norman Markuson, 5 N. Dak. 180;
State v. *Murphy*, 23 Nev. 390.

The following cases are generally relied upon to support the doctrine of an inherent power in the courts to suspend the execution of sentences:

People v. *The Court of Sessions*, 141 N. Y. 288;
People v. *Reilly*, 53 Mich. 260;
State v. *Addy*, 43 N. J. Law, 114;
Gehrman v. *Osborne*, 82 Atlantic, 424 (N. J. Chancellor);
Sylvester v. *The State*, 65 N. H. 193.
Ex parte Williams, 26 Fla. 310;
Commonwealth v. *Dowdican's Bail*, 115 Mass. 133;
St. Helaire, Petitioner, 101 Me. 522;
Webber v. *The State*, 58 Ohio State, 616.

An analysis of these cases, however, tends very much to weaken their effect as authorities. In the case of the *People* v. *The Court of Sessions*, *supra*, which is the case mainly relied upon, there was a statute of the State expressly authorizing courts to suspend sentences "when favorable or extenuating circumstances appear and when youths are convicted of their first offense." Moreover, the statement of the court (p. 293) as to the existence of the

power at common law is weakened by an incorrect quotation from Lord Hale, whose actual language does not bear out the decision of the court. The cases of *State* v. *Addy* and *Gehrman* v. *Osborn* in New Jersey are weakened by the limitation of the doctrine to cases only where neither the prosecuting attorney nor the defendant objects. The case of *Sylvester* v. *The State* in New Hampshire, of *Commonwealth* v. *Dowdican's Bail* in Massachusetts, and of *St. Helaire, Petitioner,* in Maine, turn upon a recognized practice confirmed by statute by which the courts in those States have power to place an indictment on file. It is clear that the law in those States depends upon some local usage. The case of *Webber* v. *The State,* in Ohio, is a *per curiam* decision without any reasoning, and the case of *Ex parte Williams,* in Florida, merely follows, without reasoning, the cases of *State* v. *Addy* and *Commonwealth* v. *Dowdican's Bail.* Many of these cases are further weakened by the fact that the decision was made in answer to an application of the defendant himself, who had agreed to the suspension, and who may very well be said on that account to have waived his rights. On principle it seems clear that no such power as this can safely be entrusted to the courts without such limitations as are invariably fixed when the matter is regulated by statute. The objections to such an inherent power are nowhere better stated than in the opinion of Chief Justice Cooley in *People* v. *Brown, supra,* and in the dissenting opinion of Judge Champlin in *People* v. *Reilly,* 53 Mich. 260.

In the former case the Chief Justice said:

> * * * they (petitioners) formally request the judge himself * * * to grasp at power not confided to him, and usurp authority in the interest of a doubly convicted offender. * * * Now it is, no doubt, competent for a criminal court, after conviction, to stay for a time its sentence; * * * but it was not a suspension of judgment of this sort that was requested or desired in this case; it was not a mere postponement; * * * in other words, what was requested of the judge was that he should take advantage of the fact that he alone was empowered to pass sentence, and, by postponing indefinitely the performance of this duty, indirectly, but to complete effect, grant to the respondent a pardon for his crime. * * * No doubt judges have done this sometimes under the pressure of such influence as appears here, but this is no reason for asking a repetition of the wrong; it is rather a reason for being specially careful and particular not to invite it, lest by and by, it come to be understood that the power to pardon, instead of being limited to one tribunal, is confided to many; and that the pressure of influence and respectability may be as properly employed with a judge to prevent sentence as many seem to think it may be with a Governor to procure a formal pardon. (27, 28.)

In the *Reilly* case, Judge Champlin said:

> * * * If the judge entertained serious doubts of his guilt, he should have recom-

> mended the Governor to pardon the respondent; and if he entertained no serious doubts of his guilt, he should have pronounced judgment instead of setting the criminal at large upon his own recognizance. If such power can be exercised by a judge, it incorporates into our administration of the criminal law the "ticket-of-leave" system of the English judicature without its surveillance and checks, and places the criminal at the caprice of the judge, subject to be called up for sentence at any time. If the judge can delay the sentence one year, I do not see why he may not fifteen years. An exercise of such power in this age would be no less revolting to our sense of justice than was the exercise of such power in the reign of James I., when he sent Sir Walter Raleigh to the block fifteen years after his conviction.

It is true that the two cases last referred to dealt with the power of the court to postpone the imposition of sentence, but if the court has no power to postpone its imposition, *a fortiori* it has no power to suspend the execution of a sentence after it has been regularly imposed. In the case of *Neal* v. *The State*, *supra*, the Supreme Court of Georgia said:

> The power to indefinitely postpone the punishment prescribed by the law, whether exercised by suspending the imposition, or by suspending the execution, of a sentence, is the power to perpetually prevent punishment, a power which, under such provisions as are found in the constitution of this State, does not exist in the courts. The authorities draw

> a clear distinction between the suspension of a sentence and the suspension of the enforcement of a sentence; and, however they may differ as to the right of a court to indefinitely postpone its judgment in a criminal case, it is well established that it can not, after the judgment is rendered, indefinitely postpone its execution. * * * Therefore the power to indefinitely suspend its execution, either in whole or in part, would be the power to prevent the enforcement of the law and to defeat the demands of justice. * * * (514, 515.)

These considerations and arguments are peculiarly applicable to the present case. Henehan was indicted under section 5209 of the Revised Statutes, which expressly provides that on conviction the defendant "shall be imprisoned not less than five years nor more than ten." The effect, therefore, of the judge's order in the present case suspending the execution of the sentence was practically to overrule the will of Congress and to substitute his own decree for the law of the land.

II.

A Writ of Mandamus from this Court is the Proper Remedy to Correct the Action of the Lower Court.

Section 688, Revised Statutes, provides in part as follows:

> The Supreme Court shall have power to issue * * * writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States * * *.

The "principles and usages of law" here referred to were early defined by Chief Justice Marshall in *Ex parte Crane*, 5 Pet. 190, 192, and his views were affirmed in *Ex parte Bradley*, 7 Wall. 364, 375, 376, as follows:

> * * * The learned Chief Justice observes: "A doubt has been suggested respecting the power of the court to issue the writ. The question was not discussed at the bar, but has been considered by the judges. It is proper," he observes, "that it should be settled, and the opinion of the court announced. We have determined that the power exists." He then refers to the definition and office of the writ as known to the common law in England, and to the language of Blackstone in speaking of it, as follows: "That it issues to the judges of any inferior court, commanding them to do justice, according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the Court of King's Bench to superintend all other inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the crown or the legislature have invested them; and this, not only by restraining *their excesses*, but also by quickening their negligence, and obviating the denial of justice." The Chief Justice then refers to the 13th section of the judicial act, which enacts that the Supreme Court shall have power to issue writs of prohibition to the District Courts when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases war-

ranted by the principles and usages of law, to any courts appointed or persons holding offices under the authority of the United States. "A mandamus to an officer," he observes, "is held to be the exercise of original jurisdiction; but a mandamus to an inferior court of the United States is in the nature of appellate jurisdiction."

Two of the judges dissented, and one of them, Mr. Justice Baldwin, delivered an elaborate opinion adverse to the decision, in which every objection to the jurisdiction is very forcibly stated. Since this decision the question has been regarded at rest, as will be seen from many cases in our reports, to some of which we have referred.

These views have been exemplified by a long line of decisions in this court, of which the following appear most applicable here:

United States v. *Peters*, 5 Cranch. 115;
Ex parte Bradstreet, 7 Pet. 634;
Postmaster General v. *Trigg*, 11 Pet. 173;
Life and Fire Ins. Co. v. *Wilson*, 8 Pet. 291;
Ex parte Newman, 14 Wall. 152;
Ex parte Roberts, 15 Wall. 384;
Ins. Co. v. *Comstock*, 16 Wall. 258;
Ex parte French, 100 U. S. 1;
In re Hohorst, 150 U. S. 653;
The United States, petitioner, 194 U. S. 194;
In re Winn, 213 U. S. 458;
In re Metropolitan Trust Co., 218 U. S. 312;
Ex parte Metropolitan Water Co., 220 U. S. 539.

In *in re Winn, supra,* the following statement was made:

> Authority to issue writs of mandamus to any courts appointed under the authority of the United States was given to this court by a provision in the original judiciary act, which now appears in section 688 of the Revised Statutes. A writ of mandamus issued under this provision is for the purpose of revising and correcting proceedings in a case already instituted in the courts, and is deemed a part of the appellate jurisdiction of this court, which is subject to such regulations as the Congress shall make. (465–6.)

Particular attention is called to the following cases:

In *United States* v. *Peters, supra,* a very important controversy arose between the Federal Government and the State of Pennsylvania, and a mandamus was issued by this court to the judge for the district of Pennsylvania commanding him to execute a sentence;

In *Postmaster General* v. *Trigg, supra,* the motion was for a mandamus to the United States court to order an execution to issue on a judgment entered in the case. While the motion was denied because a prima facie case of improper conduct was not made out, yet the court evidently had no doubt of its jurisdiction;

In *Life and Fire Insurance Company* v. *Wilson, supra,* a mandamus was issued to the lower court ordering it to sign a judgment;

In *Ex parte Roberts, supra,* a mandamus was issued to the Court of Claims directing it to hear and decide

a motion for a new trial and to correct its records accordingly;

In *Ex parte French, supra*, an application was made for a mandamus to direct the Circuit Court to proceed and completely execute its judgment. While the petition was denied on the merits, this court evidently entertained no doubt of its jurisdiction to issue the writ in such a case;

In *United States, petitioner, supra*, a mandamus was granted to the District Court ordering it to enter final judgment on its records in certain causes.

In the most recent case on the subject, *Ex parte Roe*, 234 U. S. 70, while the petition was finally dismissed because the order complained of was a judicial act, yet jurisdiction was assumed of a petition to mandamus the District Court of the United States to remand a cause to the State court.

In the present case, if the argument under the first heading be sound, the order suspending the execution of the sentence was entirely void, and the petitioner has no other remedy to enforce its rights. According to the contention of the petitioner, the court refused to execute its lawful judgment, and can only be compelled to do so by the mandate of this court. It is submitted, therefore, that the writ should issue as prayed.

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MAY, 1915.

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In the Supreme Court of the United States.

OCTOBER TERM, 1915.

EX PARTE THE UNITED STATES, *Petitioner.*
NO. 12, ORIGINAL.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On March 5, 1915, James J. Henehan was indicted in the United States District Court for the Northern District of Ohio, Western Division, for violation of section 5209, R. S., by embezzling moneys of the Second National Bank of Toledo while he was its assistant cashier and head paying teller, in the sum of three thousand dollars on June 13, 1914, and the further sum of seventeen hundred dollars on July 30, 1914; and by making various false entries in the books of the bank to conceal these embezzlements. (Exhibit A to petition, pp. 28–33.)

On March 15, 1915, he plead guilty, and was forthwith sentenced to—

> be imprisoned * * * at Leavenworth, Kansas, for a period of five years, and that he pay the costs of prosecution, etc. (Exhibit A, *supra*, p. 34.)

On the same day, though—

> there were no proceedings pending for a review of the said judgment and nothing requiring further action by the court * * * was necessary before the said judgment should become final. (Exhibit A, *supra*, pp. 36–40.)

the court made a separate order *on defendant's application*——

> that the execution of the sentence be, and it is hereby suspended *during the good behavior of the defendant*, and for the purpose of this case this term of this court is kept open for five years. (Exhibit A, *supra*, p. 34.)

The Government moved to vacate this order as being beyond the power of the court. On April 9th its motion was overruled. On the same day it filed with the clerk of the court a præcipe for a commitment which the clerk refused to issue. Forthwith, on such refusal, the Government moved the court for an order requiring the clerk to issue such commitment. This motion was by the court denied. The Government duly excepted to those several orders of the court. (Exhibit A, *supra*, pp. 34–41.)

As a result Henehan, though sentenced and unpardoned, is at large. The Government in this proceeding challenges the validity of this order suspending sentence and extending the term, and denies the power of the court to make it.

As to so much of the order as relates to suspension, it insists—

(1) THAT THE ABATEMENT, SUSPENSION, OR MODIFICATION OF A PUNISHMENT ONCE ADJUDGED IS

AN EXERCISE OF EXECUTIVE POWER (THE PARDONING POWER) WHICH THE JUDICIARY MAY NOT USURP, AND INCIDENTALLY THAT SUCH A POWER NEITHER INHERED IN, NOR WAS EVER RECOGNIZED AS BELONGING TO, ANY COURT; AND

(2) THAT CONGRESS NEVER ATTEMPTED TO BESTOW IT UPON THE DISTRICT COURTS OF THE UNITED STATES.

AS TO THE TERM CONTINUANCE FEATURE IT INSISTS THAT ANY EXISTING TERM OF ANY FEDERAL COURT, IF NOT SOONER TERMINATED BY FINAL ADJOURNMENT, IS AUTOMATICALLY TERMINATED BY THE ARRIVAL OF THE DAY APPOINTED BY STATUTE FOR THE COMMENCEMENT OF A NEW TERM OF THE SAME COURT AT THE SAME PLACE.

ARGUMENT.

I.

THE FUNDAMENTAL PURPOSE OF EXERCISING JUDICIAL POWER IS TO ACCOMPLISH THE FINAL RESOLUTION OF CASES AND CONTROVERSIES—NOT THE INDEFINITE POSTPONEMENT OR SUSPENSION OF EITHER.

1. Jurisdiction, i. e., judicial power is the power to fully administer the law.

The author in 2 *Bouvier's Law Dictionary*, p. 57 (1897), defines jurisdiction as—

> The authority by which judicial officers take cognizance of and *decide* causes. 60 Vt. 618. The power to hear and *determine* a cause. 3 Ohio 494; 6 Pet. 709; 2 How. 388. The right of a judge to *pronounce a sentence of the law*, on a case or issue before him, acquired through due process of law. It *includes power to enforce* the *execution of what is decreed*. 9 Johns. 239; 3 Metc. (Mass.) 460; Thach. 202.

Brown on Jurisdiction terms it "the power to *adjudge* concerning the general question involved" (sec. 3, p. 15); "the power to judicially *administer the law*" (sec. 12, p. 54). See also sec. 13, p. 60.

2. All the judicial power of the Federal district courts and of the judges thereof must be traced to acts of Congress passed pursuant to the Constitution.

Federal courts derive their powers (save those presently to be considered that inhere in the very definition of a court) from the Constitution and acts of Congress. On this subject, Brown on Jurisdiction, sec. 12, pp. 54–55, says:

> * * * *A court has no authority to do an act unless expressly or impliedly authorized* by the supreme power of the State; the word "State" applies to the Nation as well as the States that compose it * * * and the *statutes* prescribe the manner in which the court shall be conducted * * * as well as the method or rules of *procedure governing them.* There are *no courts* in *this country except those so created.*

See also *Cooper* v. *Reynolds*, 10 Wall. 308, 316.

In *Martin* v. *Hunter*, 1 Wheat. (U. S.) 328, the court said:

> Such is the language of the article (III) *creating* and *defining* the judicial power of the United States.

In *Ex parte Vallandigham*, 1 Wall. 243, 249, 250, the court said:

> The courts of the United States *derive authority* to issue such a writ from the *Consti-*

> *tution* and the *legislation of Congress.* To place the two sources of the right * * * in obvious contrast * * * we will cite so much of the third article of the Constitution as we think will best illustrate the subject: "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." "The judicial power shall extend to all *cases* in law and equity arising under the Constitution and laws of the United States," etc.

3. That power is also a power to administer law.

Section 2 of Art. III, *supra*, limits "the judicial power" to "*cases*" and "*controversies*," the former word comprehending both civil and criminal matters. *Chisolm* v. *Georgia*, 2 Dallas 419, 431; *Tennessee* v. *Union & Planters Bank*, 152 U. S. 459; Garland and Ralston, "*United States Courts*," p. 7.

In the *Tennessee* case, *supra*, it is said:

> The third article of the Constitution, said Chief Justice Marshall, enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws and treaties of the United States, *when any question respecting them shall assume such a form that the judicial power is capable of acting on it.* The *power is capable of acting only* when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a *case*, etc. (459.)

The oath taken by every Federal judge is to "*administer* justice." (Sec. 712, R. S.)

The excerpts from Federal statutes quoted in the note below reenforce this idea.[1]

---

[1] Sec. 587, R. S.: "and thereupon the Circuit Court shall proceed to *hear* and *determine*," etc.

Sec. 615, R. S.: "and said court shall take cognizance of, and proceed to *hear* and *determine* the case," etc.

Sec. 645, R. S. (35 Jud. Code): "and thereupon such proceeding, trial, and *judgment* may be had," etc.

Sec. 655, R. S.: "to be transferred for trial or *determination* to the other of said circuit courts."

Sec. 737, R. S. (50 Jud. Code): "the court may * * * proceed to the trial and adjudication of the suit," etc.

Sec. 742, R. S. (55 Jud. Code): "and the court shall have jurisdiction to *hear* and *decide it* and to *cause mesne* or *final process to be issued and executed*," etc.

Sec. 746, R. S. (8 Jud. Code): "and the court may proceed therein and *bring* it *to a conclusion*."

Sec. 974, R. S.: "and *on every conviction* for any other offense not capital the court may * * * *award* that the defendant shall pay the costs," etc.

Sec. 1026, R. S.: "in every case * * * where * * * the demurrer is overruled, *the judgment shall be* respondeat ouster," etc.

Sec. 1032, R. S.: "and when the party pleads not guilty * * * the *cause shall, without further* form or ceremony, *be tried* by a jury."

Sec. 1036, R. S.: "they (the jury) may render a verdict in regard to those as to whom they do agree, *on which a judgment shall be entered accordingly*."

Sec. 1987, R. S.: "and to be recoverable from the defendant as *part of the judgment in case of conviction*."

Sec. 300, Jud. Code (36 Stat. 1087): "all offenses committed * * * prior to the taking effect hereof * * * may be *prosecuted and punished* * * * in the district courts in the same manner as if this act had not been passed."

Sec. 290, Jud. Code: "all suits * * * shall thereupon and thereafter be proceeded with and *disposed of*," etc.

Sec. 54, Penal Code (35 Stat. 1088): "Fines collected shall be paid into the public school fund," etc.

4. The law can not be said to have been completely administered until the court has accomplished the execution of the sentence, i. e., the punishment prescribed by law.

Bouvier says (*supra*), "It (the judicial power) includes power to enforce the execution of what is decreed." Brown on Jurisdiction says, "It ordinarily may enforce its judgment * * * by execution." (Sec. 13, p. 60.) And again, "The jurisdiction of a court is not exhausted by the rendition of its judgment, *but continues until the judgment is satisfied.*" (Sec. 3a, p. 21.)

No one would seriously urge that a court had the power in any civil case to indefinitely suspend either the rendition or the execution of a judgment; and yet the source of Federal judicial power and the purpose of its exercise are the same in all cases, *civil as well as criminal.*

Sec. 213, Pen. Code: "any person violating any provision of this section may be tried and *punished*," etc.

Sec. 281, Pen. Code: "when a person is convicted * * * the court may, in its discretion, direct that the amount of the fine * * * be paid," etc.

Sec. 311, Pen. Code: "except as otherwise expressly provided, the offenses defined in this chapter *shall be punished* as hereafter provided."

Sec. 329, Pen. Code: "shall have jurisdiction to hear, *try and determine* * * *. Any person *convicted* * * * *shall be subject to the same punishment.*"

Sec. 331, Pen. Code: "the court before which any person is convicted of murder * * * may, in its discretion, *add to the judgment* of death," etc.

Sec. 333, Pen. Code prescribed punishment demanded in the case of an accessary after the fact.

5. Federal statutes punishing crime are unconditionally mandatory save for the maximum and minimum of punishment fixed in each statute.

The general phrasing of the various sections of the Penal Code defining crime is "whoever shall [then follows a definition of the criminal act] * * * shall be punished," or "shall be imprisoned," or "shall be fined," or "shall be fined and imprisoned," or "shall be fined or imprisoned, or both;" while occasionally there appears "whoever shall violate," or "whoever is convicted of," or "upon conviction thereof" "shall be punished" or "imprisoned," etc. (Secs. 2, 122, 175, Penal Code; sec. 5344, R. S.) That these prescribed punishments are meant to limit the court's power is evidenced by sec. 338 of the Penal Code, which reads:

> SECTION 338. The omission of the words "hard labor" from the provisions prescribing the punishment in the various sections of this act shall not be construed as depriving the court of the power to impose hard labor *as a part of the punishment*, in any case *where such power now exists.*

Mindful that every Federal statute defining crime declares that the criminal actor shall be punished in a certain prescribed way, and allows latitude to a court or judge only as between the maximum and minimum punishment prescribed by the statute itself, can it be that a district judge, on the theory of some reserved power in his court or office, may order that the convicted person shall not be so punished? If so, we must

read into each of these sections a proviso, in substance, "unless the trial judge shall decide otherwise." And if he may suspend imposition or execution of sentence upon the reserved power in *minor* offenses, equally may he do so in cases of *murder, treason,* and the *graver* felonies. In the event this power does inhere, Congress should simply provide that the punishment for all crime shall be such, if any, as the trial judge shall direct. If it lies in the power of the judge to stop the administration of the criminal law short of the application of punishment, having made up his mind that a particular defendant ought not to be punished, why go through the idle formality of a jury trial? Rather, upon the return of the indictment, or any time after he reaches the conclusion that there ought to be no punishment, let him suspend all further proceedings against the accused during his good behavior, or for such arbitrary period as shall seem to the court appropriate.

II.

UNDER OUR SCHEME OF GOVERNMENT THE PARDONING POWER, WHICH INCLUDES REPRIEVE AND COMMUTATION, IS AN EXCLUSIVE FUNCTION OF THE EXECUTIVE BRANCH, NOT TO BE ENJOYED BY THE JUDICIARY.

In *United States* v. *Mid-West Oil Co.*, 236 U. S. 459, 511, this court said:

> It is one of the great functions of this court to keep * * * each branch of the Government within the sphere of its legitimate action, and prevent encroachment of one branch upon the authority of another.

In *United States* v. *Klein*, 13 Wall. 128, 147, of an act of Congress attempting to require the courts to declare the force of a pardon, this court said:

> It is the intention of the Constitution that each of the great coordinate departments of the Government * * * shall be in its sphere independent of the others. To the executive alone is entrusted the power of pardon. * * *. Pardon includes amnesty * * *. It may be granted on conditions.

See also *Ex parte William Wells*, 18 How. 307, 310, 311, 314; *Ex parte Garland*, 4 Wall. 333.

This feature will be further exploited in the analysis of authorities in IV, *infra*.

III.

CONGRESS HAS NEVER ATTEMPTED TO BESTOW SUCH A POWER ON EITHER THE DISTRICT COURTS OR THEIR JUDGES.

1. Conceding, for the moment only, that Congress might constitutionally give this power of *indefinite* suspension, as distinguished from a mere parole, it has never yet undertaken to bestow it on district courts or judges either in express terms or by necessary implication. On the contrary, while it has bestowed a restricted power of parole on judges within the District of Columbia (36 Stat., 864), it has hitherto refused to pass any bill lodging a like power of parole in district judges generally. (S. 3798, 61st Cong., 2d sess. Introduced 12–10–1909; H. R. 20974, 63d Cong., 3d sess.

Introduced Jan., 1915.) The function assumed by respondent here is broader than that exercised in parole as limited in the measures before Congress. Having refused to grant this lesser power, it can not be assumed that it would grant the greater. If it had ever meant to try to lodge so large a power in Federal courts or judges it would have used no uncertain language in that regard.

2. It has provided for a stay of execution in specific instances only, by section 988, R. S.,[1] which section is made applicable to fines and penalties in criminal cases by section 1041, R. S.

Section 1040, R. S., provides:

> Whenever a judgment of death is rendered * * * and the case is carried to the Supreme Court * * * the court rendering such judgment shall * * * postpone the execution thereof from time to time and from term to term, until the mandate of the Supreme Court in the case is received and entered upon the records of such lower court. In case of affirmance by the Supreme Court, the court rendering the original judgment *shall appoint a day* for *the execution thereof;* and in case of reversal, such further proceedings shall be had in the lower court as the Supreme Court may direct.

[1] Section 988, R. S.: "In any State where judgments are liens upon the property of the defendant, and where, by the laws of such State, defendants are entitled, in the courts thereof, to a stay of execution for one term or more, defendants in actions in the courts of the United States, held therein, shall be entitled to a stay of execution for one term."

Congress has also provided methods of avoiding indefinite imprisonment for fines and costs (sections 1042 and 5296, R. S.); and it has expressly recognized three judicial proceedings as of right—but three only—available to a defendant after verdict of guilty to defeat the execution of a criminal sentence. These are a motion for new trial, a motion in arrest of judgment, and a writ of error. Secs. 670, 726, R. S., and sec. 128, Judicial Code (36 Stat. 1133). Otherwise, as evidenced by the various Federal statutes, *supra*, Congress has plainly indicated that sentence must be *promptly pronounced* and *executed* upon a verdict or plea of guilty.

3. We now consider section 722, R. S., which reads:

> The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this title (XIII, sections 530 to 1093, incl.) and of the title "Civil Rights" (XXIV, sections 1977 to 1991, incl.) and of the title "Crimes" (LXX, sections 5323 to 5550, incl.) for the protection of all persons in the United States in their civil rights and for their vindication *shall be exercised and enforced in conformity with the laws of the United States*, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object or are deficient in the provisions necessary to furnish suitable remedies and *punish offenses* against the law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is

> held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and *disposition of the cause;* and, *if it is of a criminal nature, in the infliction of punishment on the party found guilty.*

Of the sections referred to, sections 563, 629, and 711, R. S., give to one or the other—the district or circuit courts—complete jurisdiction; i. e., power to hear, determine, and punish "all crimes and offenses cognizable under authority of the United States." This jurisdiction has all passed to the present district courts. (Subd. 2, sec. 24, Jud. Code, 36 Stat. 1091.)

Although in terms limited to the vindication of "civil rights" (*Tennessee* v. *Union and Planters Bank*, 152 U. S. 463, 468), the broad definition of "civil rights" in sections 1877 to 1991, R. S., makes it clear that, in the sense of this statute, they are to be vindicated in part by criminal prosecutions and punishments, *Boyd* v. *United States*, 116 U. S. 616, 630; *I. C. C.* v. *Brimson*, 154 U. S. 479. By it Congress, in effect, has said that the judicial power to prosecute and punish for crime "shall be exercised and enforced in conformity with the laws of the United States so far as such laws are suitable" to *accomplish such prosecution and punishment.* If a court or its judge purposes to punish the convicted or confessed criminal, the Federal laws (as evidenced by the excerpts, *supra*) are not only suitable, but well-nigh compelling to that end. It is only when there is

a disposition to *avoid* inflicting punishment, after conviction or equivalent plea, that these laws seem unsuitable. They are not deficient *for punishment*, but are hostile to its indefinite suspension. No more positive declaration of power can be framed than the phrase running through all the Federal criminal statutes, "whoever (is convicted) shall be punished," etc.

Apt indeed in this regard is the following language of Blatchford, J., in *In re Joseph Stupp*, 12 Blatchf. 501, 508, 509:

> Nor is there anything in the provisions of section 722 of the Revised Statutes which requires any different rule to be applied to the decision of the present case from that which would have been applicable in the absence of that enactment. * * * But section 722 manifestly has reference not to the extent or scope of jurisdiction or to the rules of decision, but to the forms of process and remedy. The laws of the United States are fully suitable to carry into effect the jurisdiction of this court in this case, *and they are adapted to the object of such jurisdiction, and they are not deficient in any provision necessary to furnish suitable remedies to exercise and enforce such jurisdiction.*

Of course, as to details of procedure such, for example, as whether the defendant shall be present or absent at the time of sentence, and the method of issuing and delivering process for its enforcement, the Federal statutes may be silent; and if so, refer-

ence could be had to the common law as modified (*Crowley* v. *United States*, 194 U. S. 461, 467; *United States* v. *Mitchell*, 136 Fed. 896, 909–910; *United States* v. *Eagan*, 30 Fed. 608; *Brown* v. *Bonding Co.*, 210 Fed. 844, 848). But on the question of power and duty to accomplish punishment they speak in thunder tones.

Even were this section (722) applicable to a question of power, there is no occasion to consider its final alternative, because that is only operative in the event the Federal laws "are not adapted to" or "are deficient in the provisions necessary to punish offenses."

Assuming, however, that it compelled a resort to "the common law as modified," etc., this could *only* be to find rules "to govern said court in the trial and *disposition* of the cause and * * * *in the infliction of punishment on the party found guilty.*" To resort thereto for rules to enable the court to *avoid* inflicting punishment on the party found guilty would be to fly in the very teeth of section 722 and of the whole related body of Federal law. (Cases first pargr. "IV" infra).

But even if resort were to be thus had to the "common law as modified," neither it (as will be presently shown) nor any statute of Ohio has conferred any power on criminal courts or their judges to indefinitely or arbitrarily suspend the execution of criminal sentences.

IV.

THE LAW NEVER RECOGNIZED ANY INHERENT POWER IN A COURT TO SUSPEND THE EXECUTION OF A SENTENCE FOR A LONGER PERIOD THAN NECESSARY TO DETERMINE THE LEGAL PROPRIETY OF EXECUTING IT.

In the outset we must sharply distinguish capricious suspension from suspension to await the determination of some question on the event of which depends the legal propriety of enforcing the sentence. The latter, because essential to the due administration of the law, is an inherent power of every court. The former, because it opposes the will of a single judge to the positive mandate of the law, is destructive of the due administration of the law and never can be an inherent power of any court.

In *Kendall* v. *United States*, 12 Pet. 524, 613, the court said:

> To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution and entirely inadmissible.

See also *Porto Rico* v. *Rosaly*, 227 U. S. 270, 277; and *I. C. C.* v. *Brimson*, 154 U. S. 479.

A capricious suspension of the *imposition* of sentence is essentially a *nonjudicial* act, for it leaves the convict enjoying all his civil rights as well as immunity from punishment. In practical effect it can not be distinguished from a conditional pardon. By such suspension a judge who has taken a solemn oath to completely administer it blocks the due administra-

tion of the law. Though in a less degree, the same is true as to capricious suspension of *execution*. Each, in effect, involves an exercise of the pardoning power; for while civil rights are not preserved or restored by a suspension of *execution*, no more are they by a commutation of sentence by the President. Of course, if a judge (after sentence and commitment) were to grant a parole under authority of some valid act of Congress, he would then be enforcing the law, because the parole would be a statutory element of every punishment.

This court has frequently intimated that it does not consider it an inherent power of Federal courts to capriciously stay proceedings upon their judgments or sentences.

In *Ex parte Gordon*, 1 Black, 503, 505, it said:

> The Circuit Court itself has not now the power to recall it (a death warrant).

In *United States* v. *Mayer*, 235 U. S. 55, 70, this Court said:

> The judgment was subject to review in the appellate court, but so far as the trial court was concerned it was a finality. The subsequent proceedings was in effect a new proceeding, which, by reason of its character, invoked an authority not possessed.

ANALYSIS OF AUTHORITIES.

In a note in 12 *Columbia Law Review*, p. 543 (1912), it is said:

> *The inherent power of criminal courts to control their sentences.*—In early times, when there

were no writs of error or appeals in criminal cases, the courts found it necessary to exercise rather broad control over their sentences. Thus they frequently postponed the rendering of sentence for a short and definite time, to enable the prisoner to apply to the executive for pardon. *They also asserted the right to suspend for a reasonable period the execution of a sentence which had already been rendered, in order to permit an inquiry into the sanity or pregnancy of the accused. At this point the early courts stopped, no further exception being recognized to the general rule that sentence must be imposed immediately upon conviction and, when rendered, executed with dispatch.*

The necessity for invoking the exercise of the inherent power to suspend sentence temporarily has now largely disappeared because the modern reforms of criminal procedure have made adequate provision for the review of criminal causes. Nevertheless, this power still exists, and in some jurisdictions it has been extended beyond its former scope and applied to purposes foreign to those which historically have justified its existence. Thus in the recent case of *Gehrmann* v. *Osborne* (N. J. 1912), 82 Atl. 424, the court employed it as a disciplinary measure by suspending sentence indefinitely, and putting the accused upon probation with the sentence hanging over his head. This practice is generally upheld on the theory that the power to determine when sentence shall begin includes the power to withhold it indefinitely upon condition. *This claim, however, lacks historical justification, and such suspension is a pure usurpation, the*

anomalous character of which is frequently recognized. The objections to such a practice are almost elementary: The fate of a guilty criminal should not be left indefinitely in the hands of the judge who tried the cause; the State is entitled to have sentence pronounced; and there is always recourse to the executive for pardon.

An attempt has also been made to apply a similar extension to the other form of early judicial control *in cases where the court, having rendered its sentence, seeks to suspend the execution indefinitely during the good behavior of the accused.* The inherent power to stay execution temporarily to allow an appeal or for other reasonable ends is everywhere recognized. *When, however, this power is used for probationary purposes the courts are practically unanimous in holding its exercise invalid and an infringement upon the pardoning power of the executive.* * * *

This court has expressed itself on the change accomplished in criminal procedure. *Garland* v. *Washington*, 232 U. S. 646.

In *Pointer* v. *United States*, 151 U. S. 396, 420, the question "whether a court of the United States, in the absence of authority conferred by statute, has the power, after passing sentence in a criminal case, to suspend its execution indefinitely, and until the court in its discretion removes such suspension," was suggested but not decided, the court holding that "a decision of that question is not necessary to the disposition of this case upon its merits."

Within certain limitations the power admittedly inheres. Sentence does not deprive a convict of his right of review or his sanity may be questioned. Here, until the question is resolved, stay is appropriate and may be essential. But save in case of juveniles, etc., and under specific statutes, courts are not the perpetual guardians of the sentenced.

In *United States* v. *Wilson*, 46 Fed. 748 (C. C. Dist. Idaho), the question was whether a district court of Idaho Territory, after suspending the pronouncement of sentence "until further orders of this court," could at a subsequent term revoke such order of suspension and sentence the defendant. The court said (p. 749):

> * * * There can be no doubt of the right of a court to temporarily suspend its judgment, and continue to do so from time to time in a criminal cause, for the purpose of hearing and determining motions and other proceedings which may occur after verdict, and which may properly be considered before judgment, or for other good cause. In this cause, however, the record does not show that the suspension was for any such reason, *or for a certain or short time*, but, on the contrary, it *appears it was for such uncertain time as the defendant should continue to remain so favorably impressed with the laws of the land as to obey them.* Instead of this being a mere suspension of sentence, *it operated as a condonation of the offense, and an exercise of a pardoning power, which was never conferred upon the court. In this I think the court clearly transcended its authority.*

In an unreported decision (*In re James Adams, alias James Allen*) by the United States District Court of Kansas, First Division (Oct. 29, 1914), the power to suspend the execution of the sentence was unequivocally denied. Defendant, seeking "habeas corpus," claimed that a commitment issued nine months after his conviction, upon a sentence of imprisonment "suspended during the good behavior of said defendant," was illegal. The court said:

> While it is usual to delay sentence after conviction until a motion for a new trial or in arrest of judgment, and while appeals are pending and undisposed of, or for any other good and sufficient cause, sentence is withheld; yet *when a sentence has been pronounced by the court its operation begins at once.* The court may, however, before the term adjourns change, correct, or increase or diminish a sentence of imprisonment, but this power does not extend beyond the term.
>
> In this case it was attempted to *hang a sentence of five years' imprisonment in the penitentiary over the* head of the petitioner *to be executed at such time as* the district attorney or *the judge might see fit. This can not be done.* This would leave the defendant in a very uncertain situation. *He would be unable to tell for an indefinite period whether he was a free man or a convict, and while the sentence in terms might be for five years' imprisonment, it would be in effect far more severe, because of the uncertainty as to the time of its execution. Such a sentence is wholy unauthorized by law.* The commitment issued thereon is illegal and does not

justify the imprisonment of the petitioner. *State* v. *Abbott*, 70 S. E. 6, 35 L. R. A. n. s. 112; *In re Clendenning*, 97 Pac. 650, 19 L. R. A. n. s. 1041; *United States* v. *Wilson*, 46 Fed. 748.

In *Fuller* v. *State* (1912), 57 So. 6–8, the court having "ordered that the jail sentence be suspended during the good behavior of the defendant," several months thereafter the court ordered him committed to serve the suspended sentence. The Supreme Court, at the *first* hearing, declared (p. 7): "We think there can be no doubt that the power to suspend sentence after conviction is inherent in courts." Upon a rehearing, 57 So. 806, 807, the court *reversed* its earlier decision (100 Miss. 81), and said:

> SMITH, *J.* Appellant suggests that we have confused the question of a court's power to suspend the imposition of a sentence with the question of its power to suspend the execution of a sentence after it has been imposed. As the first question is not involved herein, we will pretermit any discussion thereof and confine ourselves to the latter; that is, the power of a court to suspend the execution of a sentence after it has been imposed.
>
> Power to suspend the execution of its sentence has not been conferred upon any court in this State by our Constitution or statutes, and consequently if such power exists at all it must be one of the inherent powers of courts or be derived from the common law. The inherent powers of a court are such as result from the very nature of its organization, and

are essential to its existence and protection and to the due administration of justice. *Watson* v. *Williams*, 36 Miss. 331; *In re Waugh*, 32 Wash. 50, 72 Pac. 710; 8 Am. & Eng. Ency. Law, 28; 4 Words and Phrases, 3605. It can not be said that power to suspend the execution of a sentence is essential to the existence or protection of a court, or that it is essential to the due administration of justice, and consequently it has no such inherent power.

At common law, while a judgment remained unreversed, there were only two methods by which its execution could be stayed or prevented: First, by a reprieve, which merely delayed the execution of the sentence; second, by a pardon, which operated as an absolute bar to its execution. The power to pardon was never claimed or exercised by the courts, and will not be further considered here. Reprieves were of three kinds: First, ex mandatio regis; second, ex arbitrio judicis; third, ex necessitate legis. The first and third kinds of reprieves have no relevancy here, and we may dismiss them from further consideration. Reprieves ex arbitrio judicis, or discretionary reprieves, were granted by the courts only in exceptional cases, to prevent abuses of their process, and to prevent irreparable injustice from being done to defendants. Some of the circumstances under which this power was exercised were as follows: Where the defendant pleads a pardon, which, though defective in point of form, sufficiently manifests the intention of the Crown to remit the sentence, where it seems doubtful whether

the offense is included in some general act of grace, or whether it amounts to so high a crime as that charged in the indictment. The judge sometimes also allows it before judgment, or at least intimates his intention to do so, as when he is not satisfied with the verdict and entertains doubts as to the prisoner's guilt, or when a doubt arises, if the crime be not within clergy, or when, from some favorable circumstances, he intends to recommend the prisoner to mercy. 2 Hawkins, Pleas of the Crown, 657; 2 Hale, Pleas of the Crown, 412; 1 Chitty's Crim. Law, 757; Archbold's Crim. Plead. & Prac. 206; 4 Blackstone, 394. This right of the court did not rest on any express authority or recognized principle, but stood alone on ancient usage. 2 Dyer, 205.

In Bishop's New Crim. Proceed. (4th ed.), sec. 1299, it is stated that "the law of respite or reprieve *appears* to apply alone to capital cases." In 1 Chitty's Crim. Law, 577, and Sterling v. Drake, 29 Ohio St. 457, 23 Am. Rep. 762, the statement is positive that reprieves were granted only in capital cases. As all of the early cases which have come under our observation, upholding this power of the court, were cases wherein the death penalty was imposed, it may be that the law relative thereto applies only to capital cases. It is unnecessary, however, for us to so hold here, for the reason that the power to suspend the execution of a sentence was never exercised or claimed by the courts at common law, as we have heretofore stated, except when necessary to prevent an abuse of their process or to pre-

vent irreparable injustice from being done a defendant.

It may be also, as some courts have held, that the difference between our present criminal procedure and that of the early English courts is such that it is no longer necessary or proper for the courts to grant reprieves; but it is unnecessary for us to express any opinion on this point, for the reason that the reprieve or suspension granted in the case at bar was not for the purpose of preventing an abuse of the court's process or to prevent any injustice from being done appellant, but simply that it might be held over him *in terrorem*, thereby forcing him to refrain from further acts of lawlessness and to become a more law-abiding citizen. Since the "great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind," it may be that courts ought to possess the power within certain limits to suspend the execution of a sentence during good behavior; but the question before us is not what power the courts ought to have, but what their power in fact is.
* * *

We have examined all the cases called to our attention which are in real or apparent conflict with the views here expressed, and have reexamined those cited in support of our former opinion, and find that all of them are either not in point or were decided upon a misconception of the inherent powers of a court or of what the common law upon this point was. In *State* v. *Crook*, 115 N. C.760,

> 20 S. E.513, 29 L. R. A.260, which was a case involving the power of the court to suspend the imposition of a sentence and not of the execution thereof, the court, in upholding the power of the lower court so to do, frankly stated that it could find no precedent to support its decision. *We are therefore of the opinion that we erred in holding that the lower court had inherent power, or any power at all, to suspend the execution of a sentence during the good behavior of a defendant.*

In *In re Webb* (1895), 89 Wisc. 354, 62 N. W. 177, the trial court had ordered "that the sentence of imprisonment (6 mos.) be suspended until further order of the court." At a succeeding term more than 6 mos. later the court ordered defendant committed to jail. In habeas corpus proceedings the Supreme Court, ruling that defendant could not be held because his term of imprisonment had expired, said (356):

> * * * After the defendant had been convicted and the sentence of the law in legal and proper form had been pronounced against him, it is difficult to understand upon what principle the court could further interfere in the premises. The right of the court, for cause, within the exercise of a reasonable discretion, to postpone sentence or suspend sentence, as it is said, seems to be clear; but we think, both upon principle and authority, its right to suspend the execution of the sentence after it had been pronounced can not be sustained except as

> incident to a review of the case upon a writ of error or upon other well-established legal grounds. After sentence given, the matter within these limits would seem to be wholly within the hands of the executive officers of the law.
>
> * * * And the action of the court in the premises after it had regularly pronounced the punishment provided by law for the offense in question, is clearly obnoxious to the objection that it is an attempted exercise of power, not judicial, but vested in the executive.

In *Spencer* v. *State* (1911), 125 Tenn. 64, 75, 140 S. W. 597, 600, the court, after reviewing the cases dealing with this subject, said:

> The cases just referred to, indicate the general nature of the grounds on which an execution of the sentence may be postponed. The principle is that the postponement can not be made except on some ground conducive to the more perfect execution of the final process or to the safeguarding and security of the prisoner's rights in respect of the particular litigation out of which has grown the judgment or sentence on which the execution is awarded. *It can not be stayed merely for the purpose of enabling the trial judge to hold the sentence in terrorem over the head of the prisoner to secure future good behavior.*

In *People* v. *Barrett*, 202 Ill. 287 (1903), the precise question was as to the power of the court to *suspend sentence*, but the court, in its opinion, discusses gener-

ally not only that question, but also the power to stay execution thereof (p. 290):

> * * * but to suspend indefinitely the pronouncing of the sentence after conviction, or to suspend indefinitely the execution of the judgment after sentence pronounced, is not within the power of the court. To allow such a power would place the criminal at the caprice of the judge. If the judge can delay the sentence for one year, he could delay it for fifteen years, or any length of time.

On principle no such power as this can safely be entrusted to courts without such limitations as are invariably fixed when the matter is regulated by statute. The objections to such an inherent power are nowhere better stated than in the opinion of Chief Justice Cooley in *People* v. *Brown*, 54 Mich. 15, and in the dissenting opinion of Judge Champlin in *People* v. *Reilly*, 53 Mich. 260, though each case involves directly only the suspension of imposition of sentence. In the *Brown* case Chief Justice Cooley said:

> * * * they (petitioners) formally request the judge himself * * * to grasp at power not confided to him, and usurp authority in the interest of a doubly convicted offender. * * * Now it is, no doubt, competent for a criminal court, after conviction, to stay for a time its sentence; * * * but it was not a suspension of judgment of this sort that was requested or desired in this case; it was not a mere postponement; * * * in other words, what was requested of the judge was

that he should take advantage of the fact that he alone was empowered to pass sentence, and, by postponing indefinitely the performance of this duty, indirectly, but to complete effect, grant to the respondent a pardon for his crime. * * * No doubt judges have done this sometimes under the pressure of such influence as appears here, but this is no reason for asking a repetition of the wrong; it is rather a reason for being especially careful and particular not to invite it, lest by and by it come to be understood that the power to pardon, instead of being limited to one tribunal, is confided to many; and that the pressure of influence and respectability may be as properly employed with a judge to prevent sentence as many seem to think it may be with a governor to procure a formal pardon.

The language appears to be in direct conflict with the decision of the same court, in the same year, in *People* v. *Reilly* (1884), 53 Mich. 260, which is not mentioned in the Brown case. It is significant that Champlin, J., who dissented in the *Reilly* case, in a well-reasoned opinion, is found two years later delivering the opinion of the court in *People* v. *Felker* (1886), 61 Mich. 110, denying, in no uncertain terms, the power of the court to suspend sentence.

In his dissenting opinion Judge Champlin said:

If the judge entertained serious doubts of his guilt he should have recommended the governor to pardon the respondent; and if he

> entertained no serious doubts of his guilt, he should have pronounced judgment instead of setting the criminal at large upon his own recognizance. If such power can be exercised by a judge, it incorporates into our administration of the criminal law the "ticket-of-leave" system of the English judicature without its surveillance and checks, and places the criminal at the caprice of the judge, subject to be called up for sentence at any time. If the judge can delay the sentence one year, I do not see why he may not fifteen years. An exercise of such power in this age would be no less revolting to our sense of justice than was the exercise of such power in the reign of James I., when he sent Sir Walter Raleigh to the block fifteen years after his conviction.

The *Reilly* case is sometimes cited as authority for the exercise of the power to suspend sentence, but it is submitted, in view of the *Brown* and *Felker* cases, *supra*, that Michigan is not one of the jurisdictions upholding that power. Indeed, in *People* v. *Cummings*, 88 Mich. 249, a statute expressly authorizing suspended sentences was held unconstitutional as encroaching upon pardoning power of the executive.

In *Neal* v. *State* (1898), 104 Ga. 509, 30 S. E. 858, the court suspended execution of the imprisonment portion of its sentence "until further order of the court." In its opinion the court said:

> The power to indefinitely postpone the punishment prescribed by the law, whether

> exercised by suspending the imposition or by suspending the execution of a sentence, is the power to perpetually prevent punishment, a power which, under such provisions as are found in the constitution of this State, does not exist in the courts. The authorities draw a clear distinction between the suspension of a sentence and the suspension of the enforcement of a sentence; and however they may differ as to the right of a court to indefinitely postpone its judgment in a criminal case, it is well established that it can not, after the judgment is rendered, indefinitely postpone its execution. * * * Therefore *the power to indefinitely suspend its execution, either in whole or in part, would be the power to prevent the enforcement of the law and to defeat the demands of justice.* * * *

In *Ex parte Peterson*, 19 Ida. 433, 113 Pac. 729 (1911), the court said:

> The District Court has no authority, after sentencing a prisoner to a term of imprisonment, to direct his release with or without bond, making such release subject to recall by the judge or court, and thereafter require the defendant to serve out the suspended term of imprisonment. * * *

In *State* v. *Abbott* (S. C.), 70 S. E. 6 (1911), involving the suspension of execution of a sentence, the court said (p. 7):

> * * * Other courts deny that the judge of a trial court possesses such discretionary

> power to suspend sentence unless the power be conferred by statute. * * * It seems to us clear that trial courts had no such general and unlimited power at common law. * * * Attempts by courts to suspend the execution of sentence or to postpone sentence beyond what is necessary to preserve the legal rights of the convict * * * are violative of the Constitution as well as the statute law of the State.

In *Ex parte Clendenning* (1908) 22 Okla. 108, 116, the court, after reviewing the cases cited in support of the contention that a court has power to suspend the execution of a sentence and thereafter at another term to order the accused committed to serve the sentence, said:

> To supplement the cases presented to us above, we have sought diligently to find other authorities; but we have been unsuccessful. Outside of those which the Attorney General has presented to sustain this judgment, we have been unable to find a solitary well-considered opinion. Every case wherein the question is squarely presented and passed upon, and the courts have given it the care and attention its importance deserves, holds, practically without dissent, that "in passing sentence on a person convicted of an offense the court has no power to provide that the imprisonment of the defendant shall begin at some future, indefinite time, depending on the happening of an uncertain contingency," etc.

The following cases also deny the power to capriciously stay execution of sentence:

In re Strickler (1893), 51 Kans. 700.
State v. *Voss* (1890), 80 Iowa 467.
Daniel v. *Peterson* (1912), 137 Ga. 826.
Ex parte Bugg (Mo. App. 1912), 145 S. W. 831.
State v. *Murphy* (1897), 23 Nev. 390, 402.
In re Norman Markuson (1895), 5 N. Dak. 180.

The conflict of state decisions relates almost entirely to suspension of *imposition* rather than suspension of execution of sentence. Of the cases usually referred to as supporting each alleged power (*People* v. *Court of Sessions* (1894), 141 N. Y. 288; *People* v. *Weaver*, 33 Mich. 297; *People* v. *Reilly*, 33 id. 260; *State* v. *Addy*, 43 N. J. L. 114; *Gehrmann* v. *Osborne*, (N. J. Ch. 1912), 82 Atl. 424; *Sylvester* v. *State* (1899), 65 N. H. 193; *State* v. *Crook*, 115 N. C. 760; *Ex parte Williams* (1890), 26 Fla. 310; *Commonwealth* v. *Dowdican's Bail* (1874), 115 Mass. 133; *St. Helaire, Petitioner* (1906), 101 Me. 522; *People* v. *Patrick* (1897), 118 Cal. 322; *Commonwealth* v. *Dunleavy*, 16 Pa. Sup. Ct. 383; *Weber* v. *State* (1898), 58 Oh. St. 616; *State* v. *White*, 117 N. C. 806), all save the last two involve suspension of *imposition* only. Some of the cases illustrating the contrary view as to *imposition* of sentence are: *State* v. *Hockett* (1908), 129 Mo. App. 639; *Gray* v. *State* (1886), 107 Ind. 177; *People* v. *Barrett* (1903), 202 Ills. 287; *People* v. *Brown*, 54 Mich,

15; *People* v. *Felker* (1886), 61 Mich. 110; *In re Flint* (1903), 25 Utah 338; *Republic* v. *Pedro*, 11 Hawaii 287.

While criticism of cases asserting the power to suspend *imposition* is not essential here, their analysis so weakens their force on this closely related question, and indirectly so fortifies our contention that we venture to consider them.

In the first *Court of Sessions* case, *supra*, while the court said—

> 'There can, I think, be no doubt that the power to suspend sentence after conviction was inherent in all such courts at common law (292)—

the facts do not justify or demand so broad a statement. Sentence had been suspended "during good behavior." Subsequently, the Supreme Court granted a peremptory writ of mandamus commanding the Court of Sessions to sentence the defendant to the punishment prescribed by law. The sole question was as to the duty of the latter court to pass such sentence.

After the granting of the writ, in 1893, section 12 of the Penal Code, prescribing the duty of courts to pass sentence, was amended by adding the following:

> But such court may, in its discretion, suspend sentence during the good behavior of the person convicted * * *.

On page 294 the court said:

> It *is admitted* by the learned district attorney that this amendment, though passed

> since the writ in this case was directed by the order, is applicable to this case, as the defendant in the indictment has not yet been sentenced, and if brought before the court for that purpose, pursuant to the command of the writ, sentence may be suspended, if the enactment is valid.

The constitutionality of that statute was alone involved. Why had the legislature deemed it necessary to bestow this power unless there was general disbelief that the power was inherent?

Moreover, the statement of the court (p. 293) as to the existence of the power at common law is weakened by an inaccurate quotation from Lord Hale whose actual language does not extend the power beyond the limit of our concession. The sentence—

> When favorable or extenuating circumstances appear and when youths are convicted of their first offense—

does not appear in (1) the 1st Am. edition, (2) the London 1778 edition, or (3) the London 1800 edition—the only three editions available in the Library of Congress at Washington. Instead thereof we find the following:

> where he is not satisfied with the verdict or the evidence is uncertain, or the indictment is insufficient. (Hale, 2, p. 412, all three editions.)

The court also refers only to earlier New York decisions suited to its need. Of these, *People* v. *Whipple*, 9 Cow. 707, 715 (1827), one of the cases cited,

must be considered overruled by *People* v. *Morrisette*, 20 How. Pr. 118 (1860), which unequivocally declared (p. 119):

> *I am of the opinion the court does not possess the power to suspend sentence indefinitely in in any case. As I understand the law, it is the duty of the court, unless application be made for a new trial, or a motion in arrest of judgment be made* for some defect in the indictment, *to pronounce judgment upon every person convicted of crime* by a jury or who pleads guilty. An indefinite suspension of the sentence prescribed by law is a quasi pardon, provided the prisoner be discharged from imprisonment. No court in the State has any pardoning power. * * * Two of the justices of the supreme court, residing in this city, have informed me that they are not aware of any such statute, or of any authority for suspending sentence against criminals who have been found guilty by a jury or have pleaded guilty.

Although the *Morrisette* case was cited on the brief for respondent in the *Court of Sessions* case, the court elected to ignore it. It seemed to throw such doubt upon what the court in the latter case calls an undoubted power as, in 1893, to lead to a statutory enactment giving the power to the courts.

In *People* v. *Court of Sessions*, 66 Hun. 550,decided in 1893, the year previous to the principal *Court of Sessions* case under discussion, the Supreme Court of New York, affirming a decision of the same court at special term, held unequivocally that a court had

no discretion, after conviction, to suspend judgment during the good behavior of the defendant. There is in the 1894 case no reference to the Supreme Court decision, the reasoning of which is especially complete and convincing.

New York cases which have followed *People* v. *Court of Sessions, supra,* have invariably, so far as those cases have been examined, laid stress upon the fact that the power to suspend sentence was expressly granted by the legislature in 1893.

Weaver v. *People* (Mich.), *supra,* and *People* v. *Reilly,* 33 Mich. 260, both relied on, cited in the (1894) *Court of Sessions* case, must be considered as overruled by *People* v. *Brown,* 54 Mich. 15, and *People* v. *Felker,* 61 Mich. 110.

State v. *Addy* (N. J.), also relied on in the *Court of Sessions* case, does not announce any sweeping doctrine. Its holding may be summed up in the following paragraph from the opinion (p. 115):

> It would seem that it is stating the matter too broadly to assert that it is always the imperative duty of a court to render judgment upon a conviction of crime unless some legal proceeding for review be interposed. Considerations of public policy may induce the court to stay its hand.

The opinion in *Gehrmann* v. *Osborne* (N. J.) is hedged about by the repeated qualification that no power exists to suspend sentence *unless the defendant has consented* to the postponement. The court expressly concedes that either the prosecution or the defendant could insist upon sentence at any

time after a case was ripe for judgment. Whatever reasoning there is in the course of the long review of authorities appears to be based upon this condition. Either the court has the power or it has not. There is no holding in the *Gehrmann* case that such a power is "inherent" in any court. Moreover, many of the cases cited in support of the conclusion have either been overruled or are to be distinguished as not going to the length necessary to uphold even the limited position taken by the court.

Sylvester v. *State, supra,* cited by the New York court, holds simply that (p. 195)—

> It has long been a common practice in this Commonwealth, * * * when the court is satisfied that, *by reason of extenuating circumstances, or of the pendency of a question of law in a like case before a higher court, or other sufficient cause,* public justice does not require an immediate sentence, to order, *with the consent of the defendant and of the attorney for the Commonwealth,* * * * that the indictment be laid on file; *and this practice has been recognized by statute.*

Dowdican's Bail (Mass.) *supra,* and *St. Helaire, Petitioner* (Me.), *supra,* are to the like effect.

The *Crook* case (N. C.), *supra,* and the *Patrick* case (Cal.), *supra,* are disposed of by holding that after moving for suspension a defendant can not afterward complain thereof. In the *Crook* case, the court said:

> We search in vain for direct authority emanating from the courts of other States to aid us in determining the precise meaning of such orders [that the judgment be suspended], be-

> cause it has not been the practice to make them elsewhere in the same way. * * * *We can not understand how the rights of the defendant are infringed or his interest prejudiced by allowing him to escape for the present* upon a partial judgment for the costs and suspending the motion or prayer for further punishment instead of subjecting him immediately to such fine or imprisonment as his own criminal conduct has made him liable to suffer.

See also *Ex parte Wells*, 18 How. 315.

Ex parte Williams (1890), 26 Fla. 310, follows, without reasoning, *State* v. *Addy, supra*, and *Commonwealth* v. *Dowdican's Bail* (1874), 115 Mass. 133, in which it is said expressly that the practice "*has been recognized by statute.*"

In *St. Helaire*, Petitioner, *supra*, the court, making no attempt to establish the doctrine upon reason, based its decision upon *People* v. *Court of Sessions*, *State* v. *Addy*, *People* v. *Reilly*, *Sylvester* v. *State*, and *Commonwealth* v. *Dowdican's Bail*, all discussed *supra*.

In the *Dunleavy* case (Pa.), *supra*, the court held valid a sentence imposed at a succeeding term, on the ground that the prior term suspension order was not a judgment, and that the duty to pronounce a valid judgment could be performed at *any* term. To like effect see *Phillips* v. *State* (1911, Ark.), 140 S. W. 734. The court, in the *Dunleavy* case, said:

> We use these as illustrations to show how dangerous * * * it would be if the hands of the court were tied by a suspension of sentence such as was made in this case.

Of the cases holding *against* the power to capriciously suspend imposition we content ourselves with the following quotation from the *Flint* case, 25 Utah, 341 (*supra*):

> But we know of no rule or principle of law whereby a court can indefinitely suspend sentence, keep the defendant in a state of suspense and uncertainty, and, long after he has been discharged from custody, have him rearrested and impose a sentence of either fine or imprisonment on him. A suspension of sentence for an indefinite period is, in effect, an exercise of the functions of the pardoning power, which belong exclusively to the board of pardons. * * *

The two cases apparently holding for the power to capriciously suspend *execution* demand attention.

In the *White* case (N. C.), *supra*, the second or corrected sentence (for breach of the condition, on which the suspension order was put in the first sentence of five years) was for but one year. It was held without citation of authority, that the power to add to a sentence later in the same term, a proviso suspending execution, flowed from the general control over a judgment during the term of its rendition; that the defendant took the benefit of the suspension, and thereby assumed the burden of the cost-payment condition attached thereto; and that in any event, as the resentence was for a shorter term, defendant could not be heard to complain.

The present respondent relies especially on the Supreme Court of Ohio. *Weber* v. *State*, *supra*, in-

volved an unconditional suspension order on a plea vacated a little later at the *same* term. The convict attacked the vacating order and his imprisonment. No attempt is made to support the decision by reasoning, authority, or statute. Because short it is quoted:

> PER CURIAM: The power to stay the execution of a sentence, in whole or in part, in a criminal case is inherent in every court having final jurisdiction in such cases, unless otherwise provided by statute. The suspension, being in favor of the prisoner, is for his benefit, and is valid whether consented to by him or not. When the suspension is upon conditions expressed in the judgment, the prisoner has the right to rely upon such conditions, and so long as he complies therewith the suspension will stand. But when the suspension is without express conditions, as in this case, it is within the power of the court to set aside the suspension at any time during the same term, on its own motion, and to order the sentence to be executed. Cases cited by counsel are to the effect that the suspension may be set aside at a subsequent term; but this case does not require us to go to that extent, because here the suspension was set aside at the same term at which sentence was passed. Judgment affirmed. (58 Ohio St. 616, 619.)

Plainly, on the facts the *expression* as to inherent power in the absence of statutory prohibition is pure *dictum*, because if the suspension order was *void* the duty of the court to execute the sentence was un-

doubted, and if *valid* its power to change the judgment at the *same* term was equally undoubted. The material portions of the Ohio statutes then and now in effect are quoted in an appendix (A) hereto. They carry the strongest implication of a duty to promptly sentence and execute (save for specific exceptions not here material), and furnish a complete detail of procedure therefor. Of course, were it necessary or proper to resort to those statutes, their interpretation by the Ohio Supreme Court—if it had interpreted them—would be conclusive here. But resort thereto is here unnecessary, and if it were necessary that court has *not* adversely interpreted them.

The Ohio court can not *conclusively* establish for this court the inherent or common-law powers of courts generally.

In Wells on Jurisdiction of Courts the author says:

> However, that body of jurisprudence (the common law) may furnish these courts (Federal) with rules of procedure, definition, and construction. (Sec. 304, p. 303.)
>
> As to what is in general included within the common law, resort must of course be had to the English and American reports of decisions by the courts. (Sec. 208, p. 213.)

In *Smith* v. *Alabama*, 124 U. S. 465, 478–9, the court said:

> There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the

> language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court, in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority. *Moore* v. *United States*, 91 U. S. 270.

See also *Ex parte Wells*, 18 How., 310, 311.

Seven years after the *Weber* case was decided and in December, 1905, the Court of Common Pleas—a court of original criminal jurisdiction in Ohio—in construing statutes then in effect, R. S. 7362 (See Appendix A to this brief) in *State* v. *Baker*, 3 Ohio N. P. Rep. N. S. 624, said:

> I conclude then that this court has authority to suspend execution of sentence *only temporarily*, * * * etc.

Of this section and case, the authors in 6 Page & Adams Anno. Ohio General Code, in a note, their section 13698, p. 644, say:

> This is the only section conferring power upon the Common Pleas Court to suspend its own sentence, and it provides merely for a temporary suspension *for the purpose of affording the defendant a reasonable opportunity to file his petition in error in the Circuit Court*, and there secure a suspension of the execution of his sentence *until that court disposes of his*

petition in error. (Citing the *Baker* case, *supra*, after having also in the same note referred to the *Weber* case, *supra*.)

In *Sterling* v. *Drake*, 29 Ohio State Rep. 457, 461—a case involving a governor's reprieve—that court classes reprieves at the common law as of three sorts: (1) Ex mandatio regis; (2) ex arbitrio judiciis; (3) ex necessitate legis—the latter comprehending pregnancy and insanity. The second was exercised by the courts as the representative of the King. On this subject it was said:

> From the above it will be seen that the power to reprieve persons under sentence of death was one of the prerogatives of the King himself, and the justices before whom the prisoner was tried, *acting in behalf of the King*, might either grant arbitrary reprieves or take them away even after the termination of their sessions. If *those acting in behalf of the King* by long usage had become authorized to thus grant or take away reprieves, it must be conclusively inferred that they were acting within the scope of the powers with which the sovereign *on whose behalf* they acted was clothed by virtue of this prerogative.

Of course it goes without saying that, though in England, where there was no division of the Government into branches, the court might act as the representative of the King, they may not in this country discharge functions exclusively confided to the executive branch of the Government. In thus tracing this power to the sovereign at the common law, the

Supreme Court of Ohio logically classifies it as a power apart from the judicial branch of the Government.

The statute, 5409 R. S., defining the offense to which Henehan plead guilty, requires that he "*shall be imprisoned not less than five years nor more than ten.*" Therefore the practical effect of the judge's order suspending execution of that sentence was to overrule the declared will of Congress and substitute his own decree for the law of the land. The bailiff of his court had at once as much authority, and as little power to take such action as had the judge himself.

V.

A FEDERAL DISTRICT COURT HAS NO POWER TO PERPETUATE A GIVEN TERM BEYOND THE STATUTORY TIME OF COMMENCEMENT OF ITS NEXT REGULAR TERM AT THE SAME PLACE.

This may be in a sense a moot question, for if the suspension order be void, commitment could issue at any term or in vacation; while, if valid, the defendant having accepted its benefits and breached its conditions, would not be heard to complain of after execution of the sentence. The portion of the order here involved reads:

> And for the purposes of this case this term of this court is kept open for five years.

The plain purpose of this order was to retain control over defendant's behavior in connection with the condition of suspension, to avoid the supposed application of the general rule so often laid down by

this court that judgments both civil and criminal, become final and pass beyond the control of a court after the expiration of the terms at which they are rendered. *United States* v. *Mayer*, 235 U. S. 67, 68, 69, and cases, and a possible further purpose was to bring it under "term control," within the meaning of a certain Ohio statute cited in the appendix to this brief.

Section 100 of the Judicial Code provides that terms of court shall be held "for the western division at Toledo on the last Tuesdays in April and October." So that during the five years in question at least nine other regular terms would automatically begin from time to time by force of the statute. Each of these might also be kept open for a like purpose in some other case; and if for five years, they could be kept open for forty years. Each term would have its own minutes and records and at the end of the period there would be a large number of different regular terms of the same single court in session at the same time and in the same place. This is utterly opposed to the very idea of a term; i. e., a periodical session spaced by vacations.

In *Bronson* v. *Schulten*, 104 U. S. 410, 415, this court said:

> In this country all courts have terms and vacations. The time of the commencement of every term, if there be a half a dozen a year, is fixed by statute, and the end of it by the final adjournment of the court for that term. This is the case with regard to all the courts of the United States. * * *

In *East Tennessee Co.* v. *Wiggin*, 68 Fed. 446, 447, Judge Lurton, speaking for the court, said:

> Unless sooner adjourned a term of the United States Circuit Court may extend from the beginning of one term *to the opening of the succeeding statutory term of said court.*

In *Jaques* v. *The Railroad Company*, 43 Conn. 32, 34, the court said:

> * * * The regular terms of the Superior Court are fixed by statute to commence at definite times, and all cases continued in the court go from one term to another in regular succession, which could not be done if one civil term could be carried into or beyond. another term of the same character. * * * And if there were no other objection it is manifest that great confusion would result from such a practice. If one term can thus be continued, so could all the terms in the county, and the result would be that many regular terms of the same court might be in existence at the same time in the same county, and it would be impossible to know to what term a case belonged. We are satisfied that one regular civil term of the court can not be continued after the time prescribed for the commencement of another regular civil term in the same county.

In *Harlan* v. *McGourin*, 218 U. S. 442, 450, this court held that the circuit court for the northern district of Alabama could continue its work during the entire period of the term fixed by statute *to tran-*

spire at that place although another statutory term had in the meantime begun *at another place in the district.*

This of course is an entirely different question from extending a term into its own successor term at the same place; and this court would not have suffered the particular term in question to have been continued into its own succeeding term by order or otherwise, as is manifest from the fact that in the opinion the *East Tennessee Co.* case, *supra,* is approvingly referred to.

Section 746, R. S., reading—

> When the trial or hearing of any cause, civil or criminal, in a circuit or district court, has been commenced and is in progress before a jury or the court, it shall not be stayed or discontinued by the arrival of the time fixed by law for another session of said court; and the court may proceed therein and bring it to a conclusion, in the same manner and with the same effect as if another stated term of the court had not intervened.

strongly indicates that Congress did not believe its created courts possessed the power to extend their *terms* beyond the statutory period.

The case of *Hume* v. *Bowie,* 148 U. S. 245, depended upon the authority given by section 770, R. S., to regulate the manner of taking appeals; and in *Bank* v. *Withers,* 6 Wheat. 106, it nowhere appears that the adjournment was to a time after the expiration of the statutory term.

The jurisdiction of *this* court was fully exploited in the brief filed for the Government in connection with the petition in this proceeding and needs no further consideration herein.

CONCLUSION.

It is respectfully submitted that the respondent, as judge of the District Court for the Northern District of Ohio, Western Division, should be commanded by this court to make and enter the order requiring forthwith the issuance of commitment and the enforcement of the execution of sentence in the case of James E. Henehan.

WILLIAM WALLACE, Jr.,
Assistant Attorney General.

AUGUST, 1915.

APPENDIX A.

OHIO STATUTES RELATING TO EXECUTION OF SENTENCE AND SUSPENSION OF SAME.

2 Swan & Critchfield (1870), Revised Statutes of Ohio, p. 1189. Sec. 4, act of March 27, 1841 (not found in latest revision):

> (66) SEC. IV. That it shall be the duty of the court, when any person shall be convicted of a capital crime or offense, or a crime or offense the punishment whereof is imprisonment in the penitentiary, to order the person so convicted into the custody of the sheriff, to be imprisoned in the jail of the county until legally discharged; etc.

The General Code of Ohio, 1910:

> SECTION 13701. If execution of sentence is not suspended by the next term of the court after *the sentence was pronounced*, the court, at such term, *shall carry it into execution*. (R. S., sec. 7323.)
>
> SECTION 13702. If a petition in error is filed and execution is suspended and, on the hearing, the judgment of the court in which the trial was held affirmed, such *court shall carry into* execution the sentence pronounced against the defendant at the next term after such judgment of affirmance is rendered. (R. S., sec. 7324.)
>
> SECTION 13703. When a person is sentenced for a felony and execution of such sentence is suspended, *the court shall order him into the custody of the sheriff to be imprisoned until the case is disposed of*, etc. (R. S., sec. 7325.)
>
> SECTION 13720. A person sentenced to the penitentiary (* * *), unless the execution

thereof is suspended, shall be conveyed to the penitentiary (* * *) by the sheriff of the county in which the conviction was had within thirty (five) days after such sentence and delivered into the custody of the warden of the penitentiary (* * *) with a copy of such sentence, there to be kept until the term of his imprisonment expires or he is pardoned. If the execution of such sentence is suspended and the judgment be afterwards affirmed, he shall be conveyed to the penitentiary (* * *) within thirty (five) days after the court directs the execution of the sentence; (provided, however, that the trial judge, or any judge of said court in said subdivision may, in his discretion, and for good cause shown, extend the time of such conveyance.) (R. S., sec. 7330.)

SECTION 13698. When a person has been convicted of an offense, and gives notice to the court of his intention to file, or apply for leave to file, a petition in error, such court, on his application, may suspend execution of the sentence or judgment against him until the next term of the court, or for such period, not beyond the session, as will give him a reasonable time to apply for such leave. (R. S., sec. 7321.)

SECTION 13699. In a case wherein judgment of conviction by the court of common pleas has been affirmed by the circuit court on error and remanded to the common pleas court for execution of judgment and sentence, and the person so convicted gives notice of his intention to apply for leave to file a petition in error in the supreme court, the court of common pleas or the trial judge at chambers, on motion of such person, if made within three days after the rendition by the circuit court of the judgment of affirmation, shall further suspend the execution of sentence for a time

sufficient to give him an opportunity to apply for leave to file a petition in error in the supreme court, and to file it, but such sentence shall not be suspended more than thirty days. (R. S., sec. 7321.)

SECTION 13700. The execution of a sentence or judgment against a person sentenced for a misdemeanor shall not be suspended unless he enter a recognizance, with surety approved by the court, that he will appear at the next term of such court and from term to term thereafter until the case in error is determined, and abide the judgment or sentence of the court. (R. S., sec. 7322.)

SECTION 13735. If a convict, sentenced to death, appears to be insane, the sheriff shall forthwith give notice thereof to a judge of the court of common pleas of the judicial district, summon a jury of twelve impartial men to inquiry into such insanity at a time and place to be fixed by such judge, and give immediate notice thereof to the prosecuting attorney. (R. S., sec. 7345.)

SECTION 13736. The judge, clerk of the court, and prosecuting attorney shall attend the inquiry. Witnesses may be produced and examined before the jury and their finding shall be in writing and signed by them. If it be found that the convict is insane, the judge shall suspend the execution until the sheriff receives a warrant from the governor directing such execution. The finding of such jury and order of such judge, certified by him, shall be entered on the journal of the court by the clerk. (R. S. sec. 7346.)

SECTION 13738 (R. S., sec. 7348) provides for inquiry as to pregnancy of female convict.

SECTION 13739. If such jury shall find that such convict is with child, the sheriff, in a like manner, shall suspend the execution of

her sentence and transmit such finding to the governor, who, when satisfied that such convict is no longer pregnant, shall issue a warrant appointing a day for her execution. (R. S., sec. 7349.)

(NOTE.—Matter inclosed in parentheses in body of section 13720 (R. S., sec. 7330) indicates amendment since 1910.)

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In the Supreme Court of the United States.

OCTOBER TERM, 1915.

NO. 12, ORIGINAL.

EX PARTE: IN THE MATTER OF THE UNITED STATES, PETITIONER.

BRIEF OF THE UNITED STATES IN REPLY.

PART I.

REPLY TO BRIEF FOR RESPONDENT.

THE CONVICT HIMSELF HAS NO RIGHT TO DEMAND SUSPENSION.

Respondent insists (brief, pp. 71–79) that a sentenced person may have an absolute right to demand suspension of execution until he can have applied for a pardon and the application has been refused; this on the theory that he has a right to a fair hearing of the application, and that such right carries with it a right to get the application before the President and have the same disposed of before he must submit to punishment. A pardon has been understood to be an act of grace and mercy. It is not believed that any absolute right can arise in connection therewith.

Were such a right to be recognized every convict would insist on suspension and delay his application for pardon under every plausible excuse, in order to postpone the punishment, upon the hope that somehow he might ultimately escape it altogether.

IS INDEFINITE SUSPENSION OF EXECUTION A PHASE OF THE PARDON POWER?

Respondent now concedes that, subject only to the qualification as to *fines* announced by this court in *The Laura*, 114 U. S. 411, the power of reprieve and pardon is an exclusively executive function.

Upon the sequential question whether an indefinite suspension of execution amounts to a pardon, commutation, or remission, while the Government announced the affirmative, it chose in argument to canvass the question from a negative standpoint (p. 10, *et seq.*), for to prevail in this proceeding it was not at all necessary to establish the affirmative. If it be a phase of the pardon power, this alone would stop the inquiry and determine the judgment to be rendered by this court. But if not, we insist that before a court or judge may exercise the function it, or he, must possess the power; and that the power could only have been acquired either (1) through the common law or (2) by congressional enactment.

While admitting the conflict in authority as to whether it is a phase of the pardoning power, we cannot allow the classification as made on page 67 of respondent's brief to go unchallenged.

For the idea that indefinite suspension of execution represents a phase of the pardon power (in addition to the decisions in North Dakota and Texas holding a statute conferring the power unconstitutional for that reason), the following authorities so declare independently of statute, as a conclusive reason against the enjoyment of such a power by courts: 12 *Columbia Law Review* (original brief, p. 19); the *Wilson* case (p. 20); the *Webb* case, (Wis.) (brief p. 26–27); the *Brown* case (Mich.) (p. 29); the *Neal* case (Ga.) (p. 31); the *Abbott* case (S. C.) (brief p. 32). And there may be added in addition, *Ex parte Clendenning*, 22 Okla. 108; and *State* v. *Voss*, 80 Iowa 467.

Of the cases listed by respondent, p. 67, as upholding as constitutional, statutes authorizing judicial suspension, the Michigan cases and the *Sessions* case (N. Y.) have been fully considered in the original brief.

In *Commonwealth* v. *Halloway*, 42 Pa. St. 446, a statute provided for a graduated "*deduction from the term of sentence*" of every prisoner having no infraction of rules recorded against him during the first year of his imprisonment, etc.; and empowered prison inspectors to discharge whenever he had served his term, less authorized deductions. The court held the act not an interference with the pardoning power, but *an invasion of the realm of the judiciary.*

In *Ex parte Parker*, 106 Mo. 551, a statute provided that the judge, at the request of the defendant unable to pay a fine, might commute such fine to imprison-

ment at so many days for each dollar fine. It was held that such statute did not interfere with the pardoning power, but simply provided an alternative punishment.

In *People* v. *Heise*, 257 Ill. 443, a statute punishing wife abandonment, provided—

> that before the trial (with the consent of the defendant) or after conviction, instead of imposing the punishment hereinbefore provided, or in addition thereto, the court in its discretion * * * shall have the power to pass an order * * * subject to change * * * as the circumstances may require directing the defendant to pay a certain sum weekly for one year to the wife * * * and to release the defendant from the custody, on probation, for the space of one year, upon his or her entering into a recognizance, etc. (446.)

The defendant had been convicted of abandoning his wife and the court ordered him, in compliance with the statute, to pay, etc. Defendant gave the required recognizance; but at once sued out a writ of error to review the court's order. Various grounds of unconstitutionality were alleged, but there was no contention that the statute interfered with the pardoning power. It is true that the opinion did, at page 450, consider the contention—

> that the statute is invalid because it authorizes the court to suspend sentence for an indefinite period of time (saying) but we know of no reason why the legislature may not give the courts the power, in certain classes of

> cases, to suspend sentence upon the defendant entering into a recognizance and thereafter impose sentence and enforce its execution.

The above shows clearly that the opinion dealt with the statute as merely authorizing suspension of *imposition* of sentence, and not execution. The distinction from the case at bar also appears in the very statute itself.

In *People* v. *Stickle*, 156 Mich. 557, the statute (wife abandonment) also related to suspension of imposition and not execution of sentence. It expressly provided—

> if, at any time before sentence, he shall enter into bond, etc., then the court may suspend sentence * * *. (559.)

In *Ex parte Bates*, 151 Pac. 698, the court distinguishes between a suspension order itself a part of the sentence, and one made after and apart therefrom and says:

> As we understand the contention of the Attorney General, it would appear that he has assumed that *the Legislature has* no *right to authorize any court* to *suspend a sentence already imposed*, and *in this we might agree that the Attorney General is correct;* but such is not the state of facts presented for our consideration at this time. (699.)

In the case at bar the order suspending execution was made after sentence and was a distinct and separate order of the court.

In *State* v. *Mallahan*, 65 Wash. 287, the order suspended *imposition* only, under a statute pro-

viding that the court might in the case of juveniles "withhold and suspend sentence and * * * have power to order his or her rearrest and pronounce sentence whenever, * * * etc.

In *In re Giannini*, 18 Cal. App. 166, the statute gave the court power to suspend both imposition and execution. The particular sentence imposed itself contained the order of suspension. Thus the case falls within the limitations in that regard of some of the cases *supra*. At least, it can not be said that the case holds that an independent and subsequent order of a court suspending a sentence already imposed would be valid, even if the statute contemplated such a suspension, which does not at all appear.

Even if indefinite suspension of execution were different from and less than a pardon, nevertheless the function does not inhere in courts and would require congressional authority for its exercise.

NO IMPLIED POWER OF INDEFINITE SUSPENSION INHERES IN ANY COURT.

Respondent's whole argument for implied power (brief, pp. 57–60) is based on the primary assumption that such a power inhered in the courts at the common law; and he indulges this assumption despite his concession (brief, p. 11) that after fullest investigation he himself can not assert that this was the case.

If his argument be limited by the common-law authorities he cites, it is to the effect that the judicial

power of reprieve exercised at the common law must be restored to the judges, in part at least; and must be so altered and extended in its scope as to now reach any case which an individual judge might regard as extraordinary, and to justify suspension for an indefinite time, and without any purpose other than possible reformation.

THE COMMON-LAW AUTHORITIES NEVER DECLARED SUCH A POWER.

Disregarding the three instances of suspension of (fine) *imposition* (p. 19) and the emotional act at the Chester Assizes (pp. 17, 18), all of the common-law authorities quoted in Respondent's brief (pp. 4–20) deal solely with "*reprieve.*" Chitty and Blackstone assert (respondent's brief, p. 9) that there were *but two* modes of staying *execution* of a sentence: (1) by reprieve and (2) by pardon; and that reprieve "operates *only* in *capital* cases." "Reprieve" was fully exploited in the government's original brief (pp. 23–25), with citation of the very authors quoted by respondent. There is no dispute as to its scope and purpose. The chief causes moving for its exercise were: (1) insufficient indictment; (2) insufficient evidence; (3) that the convict might not be hung before he could be pardoned; (4) insanity; and (5) pregnancy.

From a judicial standpoint the first two are *now* cared for by motion for new trial or in arrest of judgment; and, as shown by the extract from the opinion of this court in *Ex Parte Wells*, 18 How. 307

(quoted in respondent's brief, p. 46), ALL five are available to the President under his "reprieve" power.

Respondent concedes that common-law courts never assumed to pardon. Section 2 of Art. II of the Constitution lodged both the reprieve and the pardon power in the President *exclusively;* and this distribution accords with the view of Blackstone, announced in the very chapter quoted from by respondent, and as follows:

> * * * *in democracies*, however, this power of pardon can never subsist; for *there* nothing higher is acknowledged than the magistrate who administers the laws; and it would be impolitic for the power of judging and of pardoning to center in one and the same person. This (as the president Montesquieu observes) would oblige him very often to contradict himself, to make and unmake his decisions; it would tend to confound all ideas of right among the mass of the people, as they would find it difficult to tell whether a prisoner were discharged by his innocence or obtained a pardon through favour. (Blackstone, Tucker's Ed. 1803, Bk. 4, Ch. 31, p. 397.)

The uncertainty of respondent as to the meaning of the word "reprieve" accounts for his use of these common-law authorities; and also explains his frank confession (his brief, p. 11, ft.) that he *can not assert* that they sustain the power to indefinitely suspend sentence.

STATE DECISIONS DENIED IT.

In his summary of *State* decisions (pp. 25–37), respondent does not distinguish between those based and those not based on statute. Assuming, but not conceding, the correctness of his classification, these results follow:

1. He finds that in four States—Connecticut, Michigan, Ohio, and West Virginia—the decisions are uncertain.

2. He finds the subject now regulated by statute in three States—Indiana, North Dakota, and Washington (he might have added New York, Maine, Massachusetts, New Hampshire, and the District of Columbia).

3. He finds that in nine States—Arkansas, California, Florida, Georgia, Iowa, Maine, New Hampshire, New York, and Pennsylvania—as well as the District of Columbia, it is asserted that courts possess power to suspend indefinitely the *imposition* of sentence; while three more—Massachusetts, New Jersey, and North Carolina—declare it may be done only if the defendant consents. But he finds that in ten States—California, Illinois, Indiana, Kansas, Louisiana, Mississippi, Maine, Tennessee, Texas, and Utah—as well as the Territory of Hawaii, the power to so suspend *imposition* is denied.

4. He finds that in three States—New Hampshire, New Jersey, and New York—it is asserted that courts possess the power to suspend indefinitely the *execution* of a sentence; and that in one more—North Carolina—the power is recognized only in case the

defendant consents. But he finds that in twenty-one States—Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Massachusetts, Missouri, Nevada, New Mexico, North Dakota, Oklahoma, Tennessee, Texas, Wisconsin, and South Carolina—this power is denied.

NOTE.—In four of the States in the above classification, while the power to suspend *imposition* is asserted, the power to suspend *execution* is denied.

By his own confession, then, the preponderance of State decision is against respondent as to indefinite suspension of each, imposition and execution; as to the latter, overwhelmingly so. But we challenge the correctness of this classification. In our original brief (pp. 34–37) we analyzed the New York decisions to show that until the statute of 1893 the rule of decision was otherwise; we analyzed the New Jersey decisions, to show that they do not unqualifiedly assert this power (pp. 37, 38); we quoted the latest North Carolina decision to the effect that the court found itself without benefit of precedent on the question they were considering, viz, whether they would permit a *defendant*, who had himself sought a suspension order, to attack the sentence as void because thereof (pp. 38, 39); and we quoted the *Sylvester* case (N. H.), to show that the order was upheld only because made by consent of both defendant and State, and because such practice was sanctioned by statute. In the other New Hampshire case cited by respondent (the *Drew* case, 75 N. H. 402) defendants were seeking release on habeas corpus, on the

ground that a stay which they themselves had secured vitiated the whole judgment—the very question recently decided adversely to petitioner *Adams*, by the Eighth Circuit Court of Appeals, in *United States* v. *Adams*, not yet reported, but listed in respondent's brief (p. 47).

So we assert that the unbroken line of State decisions denies the right of a court to indefinitely suspend the *execution* of a criminal sentence. We refrain from now analyzing the classification as to imposition because that question is not here involved.

In this connection and as challenging that uncertainty of decision which respondent claims to exist in his State (Ohio), on October 9 last the Court of Common Pleas of Franklin County in *State* v. *Radcliffe*, in a well reasoned opinion, distinguished the *Weber* case, relied on by respondent, as involving but a misdemeanor, and merely the power to change sentence during the same term; and further held that the court had no inherent power after sentence to indefinitely suspend its execution; that its power was strictly limited by the terms of the statute (see our original brief, pages 41–44), that the statute did not extend to such a case, intimating that it would involve an exercise of executive power. Wherefore it denied the application.

As the opinion is not otherwise accessible, we print it in an appendix hereto.

THE ACQUISITION OF SUCH A POWER BY ITS MERE EXERCISE IMPOSSIBLE.

Though the major portion of respondent's return is devoted to laying a foundation for this claim, but eight pages of the brief (pp. 54–57 and 60–65) deal with the question.

We have no quarrel with the principle announced by the authors quoted, that law may be developed by usage, well defined, long continued, uniform, and itself not opposed to law. But no case for the application of that principle can be spelled out of this record.

The supporting facts averred in the return (pp. 4–8) are traversed in part by the government's answer thereto; and the latter also avers additional facts. Respondent submits no evidence in support of his own traversed allegations, nor has he joined issue with the additional facts averred by the government. He but insists that this court shall judicially notice the true facts in that regard. This the court may not do.

In 7 *Enc. U. S. Sup. Ct. Reps.* 687, it is said:

> The Supreme Court takes judicial notice of its own records * * * but not of the records of other Federal courts—etc.

In *Eyster* v. *Gaff*, 91 U. S. 524–525, this court said:

> It (the trial court) could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might have affected the rights of parties to the suit already pending.

In 1 Jones Comm. on Evidence, sec. 124, p. 597, it is said:

> But in a given case, the court is not held to have judicial knowledge of the pendency of proceedings in other causes in the same court; much less of those in other courts. (Citing *Eyster* v. *Gaff*, supra; *Nat'l Bank* v. *Bryant*, 13 Bush (Ky.) 419; *People* v. *De La Guerra*, 24 Cal. 73; *McCormick* v. *Herndon*, 67 Wis. 648.)

See also 1 Greenleaf on Evid. 15 Ed., Sec. 6–a, p. 14, note f, and cases.

From the return and reply thereto, however, enough conceded facts appear to show that (1) the practice never was alike in all parts of the United States; (2) within single States, the practice in some cases, differed in different districts; (3) within a single district the practice at one period would be one way and at another period the other way; (4) many judges exercised the function without any claim of right other than ex necessitate, and some even admitted their lack of power; (5) After 1891 and 1894, respectively, whenever exercised, it was in the face of the *Wilson* case, 46 Fed. 748, and the *Pointer* case, 151 U. S. 396, 420; and (6) It was always done in the face of statutes prescribing the punishment for crimes, and the established principle of public policy that offenders against the law should suffer its penalties.

What force should be given to such a practice?

As to more than 80 district judges not referred to in the return or its traverse (and because this question is only material on the theory that the power was never bestowed by law), the presumption obtains that their every official act was in conformity to law until the contrary is shown. *Williams* v. *United States* 1 How. (U. S.) 290; *Balt. & P. R. R. Co.* v. *Sixth Pres. Church*, 91 U. S. 127; *Harvey* v. *Tyler*, 2 Wall. 328; *Nations* v. *Johnson*, 24 How. (U. S.) 195. And so this court must assume that each of them has steadily refused to indefinitely suspend sentence. This presumption is peculiarly fair here, for, while court records would necessarily show every suspension, they might not show the contrary action; as applications could be made orally and ex parte, and denied without any written record, save the order of commitment.

Considering only the showing of the return and traverse, however, no power by usage could be developed because that usage was never general, reasonable, consistent or uniform, *United States* v. *Buchanan*, 8 How. (U. S.) 82, 102; and because it conflicted with statutes, a constitutional provision and an established principle of public policy. *Thompson* v. *Riggs*, 5 Wall. 663; *United States* v. *Macdaniel*, 7 Pet. 1; *Basey* v. *Gallagher*, 20 Wall. 670, 684.

In *12 Cyc. 1054–5*, it is said:

> The meaning of the rule that a usage or custom must not conflict with the law is clear, and the rule itself easy of application * *

> But if it conflicts with an established rule of public policy, which it is not to the general interest to disturb * * then it will not be recognized in courts of justice * * and whenever there is a conflict between a custom or usage and a statutory regulation, the statutory regulation must control.

If a practice must yield to a statute, much more must it yield to a constitutional provision. So a divided practice, varying in different districts will not suffice, because the power can not be enjoyed in one district and denied in another. Unless the practice be as general as the whole area over which the rule is to extend, it would be as reasonable to insist that the rule conform to that part of the practice which is opposed as to that part which is favorable to its exercise. Unlike an election contest, the question may not be settled by majorities. In such a case no inference whatever is to be drawn.

The cases cited in respondent's brief, pp. 61–63, but declare a phase of the rule announced by the authors cited on pages 54–55—a rule that we conceded at the outset. This case does not fall within the rule.

To overcome the objection that a power may not be transferred by usage from the executive to the judiciary, respondent urges that this is not an exercise of the pardoning power; that a full pardon operates to relieve of the charge and consequences, preserving civil rights if granted before, and restoring them if granted after conviction; whereas a suspension of execution does not restore civil rights lost on the imposition of sentence. It is not, however, an

essential of the pardoning power that there be restoration of civil rights or that the sentence be completely eliminated. In the case of both reprieves and commutations there never can be any restoration of civil rights and the sentence remains, for a period at least, suspended over the defendant. This feature has been already considered.

Granting, however, for argument's sake, that suspension during good behavior is distinguishable from a reprieve and may be viewed as a species of parole or probation, i. e., such a power as might be exercised by courts or judges if authorized by Congress, the case is not made by usage because it fails to establish an implied grant of power from Congress, and for these reasons:

(1.) The statutes providing for the punishment of crime are opposed to the idea; (2) the established rule of public policy requires the accomplishment of some punishment; (3) the practice has not been general throughout the United States; (4) it has not been uniform either within States or in a single district; (5) oftentimes it has been exercised simply because believed to be tolerated by the Government and in instances only because of a corresponding State practice founded on statute. (6) Since 1891 wherever practiced it has been in the face of the decision in *Wilson* v. *United States*, *supra*, expressly denying the existence of the alleged power and since 1894 in the face of the declaration of this court that the question was then undetermined. (7) The action of Congress itself precludes the implication of dele-

gated authority. While it has bestowed a limited power of parole and probation as to specific crimes on the Supreme Court of the District of Columbia, it for years has refused to do so in the case of other Federal courts. Having bestowed it as to the District it can not be urged that its refusal to otherwise bestow it was because it considered it unnecessary. Moreover, its own proceedings show that the Attorney general had suggested the lack of power, and that Congress itself regarded it as a questionable matter that should be set at rest. (House Rep. 566, *infra*).

The *Midwest Oil* case, 236 U. S. 459, *et seq.*, is not, and could not be, urged in justification of respondent's contention. There the practice was by the President *alone;* was steadily and uniformly indulged in for over eighty years; and always "under a claim of power so to do" (p. 469). Congress had repeatedly, both expressly and by implication, recognized the practice (pp. 471–79, and 34 Stat. 536). This court had also recognized it as early as 1867 in the *Grisar* case (p. 471).

In the *Midwest* case it said that Congress had the power of a private landowner, and as such, might select any agent for the public lands, and that laws as to the public lands are not "of a legislative character in the highest sense of the term" (p. 474). The court repeatedly speaks of the President as "the agent in charge" (pp. 474, 482), and finally, says:

> Nor do these decisions mean that the executive can by his course of action create a power (474).

RESPONDENT'S SO-CALLED "ORIGINAL REASONING" IS FALLACIOUS.

Respondent devotes seven pages (48–54) to original reasoning in support of his claim. Briefly his points are:

1. Minimum sentences are often too severe.
2. If courts are denied this power, for like reason grand juries must be denied power to refuse to return bills, and district attorneys the power to nolle pros indictments.
3. Concurrent service of sentences would be impossible (p. 49).
4. Change of social conditions demands restoration to judges of the common law power of reprieve, and an amplification of its scope to cover "all extraordinary cases."
5. People would regard with horror a court that would send Henahan to prison for five years.
6. England has no system of minimum penalties. The power is not needed there. We need it here until minimum penalties shall be abolished (pp. 50, 51).
7. Without the power, trivial offenses would be followed by cruel and unusual punishments.
8. Self-respecting judges should retire rather than become instruments of oppression, by administering the statutory penalties in all cases.
9. The word "court" involves a tribunal having such power.
10. Pardons are too difficult of procurement to be within the reach of the poor or ignorant.

11. Too much cruelty must be inflicted before Congress would give heed.

12. If the power is solely executive, Congress could not give relief (pp. 52, 53).

13. In the "*few extraordinary* cases" the power should exist (p. 53).

14. No complaint has been heard of its exercise, or of the exercise of the kindred power to admit to bail (p. 54).

Such reasons as numbers 1, 4, 5, 6, 7, 8, 10, 11, 13, and 14 should not be seriously urged upon this court. They are appropriate only for legislative consideration. Number 8—sequential on numbers 1 and 5—is startling in its suggestion that a judge who has taken oath to faithfully administer the law can not impose a sentence prescribed by a confessedly valid law without forfeiting his self-respect and becoming an object of horror, and that he should resign rather than enforce minimum penalties.

We quote an extract from the opinion in *Ex Parte Poulson*, Fed. Cases, No. 11,350, reading:

> The judges must be passive. It is not for them to be the first to set the example of disobedience to the law, or attempt to evade plain enactments; most especially not by the exercise of a forbidden jurisdiction. (19 Fed. Cas. p. 1208.)

and contrast that stoical declaration with the recent action of a Federal judge who found it consonant with his oath not to resign but rather to refuse to impose the minimum penalty decreed by law, and to

name a lesser one, unauthorized save by his own decree.

If these high officials, alone authorized to declare the limit of power, and prevent unauthorized action, in any branch of the government, themselves grasp forbidden power, who shall say them nay? The people are quick to note such action, and to apprehend the danger it must spell for them and their property. Seeing no relief under existing conditions, they are attracted to "judicial recall," as a simple means of control, forgetting the Pandora's box of evils that might be loosed upon them should they so destroy the independence of their judges.

Point 2, *supra*, is a *non sequitur*. Judges deal with self-confessed or convicted violators of laws imposing specific punishment. Grand juries consider mere accusations against possibly innocent persons, under laws empowering them, at their discretion, to find or refuse bills, regardless of the desires of the district attorney or court. *Hale* v. *Henkel*, 201 U. S. 61, 62, 63. And district attorneys before trial on their own responsibility, and during trial with the concurrence of the trial judge, deal with a charge denied by still presumably innocent persons, and under a power undisputedly recognized at the common law. *Reg.* v. *Allen*, 5 L. T. R. 636; *Confiscation Cases*, 7 Wall. 454, 457; *United States* v. *Schumann*, Fed. Cas. 16235; *United States* v. *Watson*, Fed. Cas. 16652; *United States* v. *Coolidge*, Fed. Cas. 14858; *United States* v. *Shoemaker*, Fed. Cas. 16279; *United States* v. *Stowell*, Fed. Cas. 16409; *Commonwealth* v.

Cain, 102 Mass. 487; *Reynolds* v. *State*, 3 Ga. 53; *State* v. *Hickling*, 45 N. J. L. 152; *State* v. *Wiley Mathews*, 98 Mo. 125; *State* v. *Bugg*, 6 Robinson, 63 (La. 1843); *State* v. *McLane*, 31 Tex. 260.

Of point 3, *supra*—as a man may commit two crimes by the same act, and at the same moment (*Gavieres* v. *United States*, 220 U. S. 338; *Ebeling* v. *Morgan, etc.*, 237 U. S. 625; *Morgan, etc.*, v. *Devine*, *ib.* 632), why may he not serve sentence for each crime during the same period unless this be forbidden by statute? The rule of concurrent service seems never to have been questioned at the common law (*United States* v. *Paterson*, 29 Fed. 775; *People* v. *Whitson*, 74 Ill. 20, 27; *James* v. *Ward*, 2 Metc. (Ky.) 271; *Miller, Warden*, v. *Allen*, 11 Ind. 389; *Ex parte Goffard*, 25 Nev. 101; *Prince* v. *State*, 44 Tex. 480); and is conceded by respondent (brief p. 59).

Of points 2 and 3 it must also be said that the power of grand juries to hear, district attorneys to dismiss, and of a court to concurrently sentence are powers independent of and in no wise related to the power to indefinitely suspend sentence. It is not at all necessary that we deny the one to defeat the other; and it will be time enough to consider each of the first named three powers when it shall be challenged in a proper case.

As to Point 6, *supra*, it is hardly correct to say that England has no system of minimum penalties. Until the passage of the Penal Servitude Act of 1891, their system was like ours. By that Act (54 and 55 Vict. Ch. 69) a three year minimum was preserved in

all cases of sentence to *penal servitude;* but the court was empowered to impose imprisonment instead of penal servitude, in which case there was no minimum—though the death penalty still remained the only and therefore the least punishment for certain crimes. In all the time before 1891, however, while England's case was like our own, no judicial power to suspend execution was enjoyed. Really this contention amounts but to this: that, because in his opinion minimum penalties are unwise, courts should lend themselves to blocking the enforcement of such laws until Congress shall be moved to repeal them.

Point 10, *supra*, advances the thought that the executive reprieve and pardon is not sufficiently available to the poor and ignorant; wherefore judges, because able to act instantly, should arrogate this power to themselves. It is unnecessary to point out the fallacy of such reasoning or here defend the adequacy of the reprieve and pardon power.

Point 4, *supra*, as inviting a new scheme of government, should be urged only upon Congress, and with an appropriate constitutional amendment. While Point 11, *supra*, would apply equally to all remedial legislation and warrant judges in assuming any function in advance of legislative authority.

As to Point 13, *supra*, we ask: Where is the authority for applying the power to "a few extraordinary cases" only; by what principle shall that class be delimited; and how shall individual judges be inspired to uniform action in their inclusion or exclusion of particular cases?

As to Point 14, *supra*, there is no similarity between the act of admitting to bail and of indefinitely suspending sentence, for in the former a court acts under constitutional mandate and statutory procedure in the case of presumably innocent men. Because of the implied challenge in the assertion of respondent that the practice has endured without complaint (brief, pp. 54, 80) we quote from among many on file in the Department of Justice a typical letter:

> This man * * * has been * * * conducting or participating in mail frauds * * * for many years. Whenever his arrest is caused on account of continued complaints, he is able to plead guilty and procure a suspended sentence. At first glance one suspension of sentence will be overlooked. A second one is questionable * * * But when (he) continually sets about * * * to ensnare and injure others * * * in * * * his criminal activities, it is high time that the public be informed as to the methods of officials * * * and an investigation be conducted to inquire the reason of this laxity, and (in-?) the administration of equal justice without fear or favor. (Dated, *July 12, 1915.*)

Agreeing with the principle of law declared in point 12, *supra*, we deny that it justifies judicial suspension. Respondent argues that the latter does not amount to reprieve or pardon. If this be true, no constitutional barrier prevents Congress from granting that power. If it be not true, Congress may, nevertheless, give

ample relief if it shall so desire by enlarging the present general parole law (36 Stat. 819). Parole is a legitimate subject of legislation because it does not amount to a pardon. If observed, it is legally efficacious to accomplish the service and expiration of sentence—not within the walls of the penitentiary, but under the control of a parole board or officer. This is as much a service as was rendered in the old days when the convict was farmed out to private contractors. The system is the product of advanced modern thought, chiefly because, without affecting the running of sentence, it affords the convict an opportunity to reestablish himself in society and, if successful, to be discharged of the sentence when the period of its term has expired.

Judicial suspension, on the other hand, leaves the sentence hanging over the convict for all the remainder of his life, to be enforced whenever, if ever, the judicial will shall so decree. Such a practice is quite contrary to the policies of modern criminology. We refuse to be put in the attitude of opposing these advanced policies, only suggesting that it is a better legislative policy to administer parole through a board or officer, independent of courts in all cases where such action might lay a court open to suspicion of the sort referred to by Blackstone, *supra;* and that Congress seems to have recognized this latter policy both in its general parole law (36 Stat. 819) and (by excluding the graver offenses from the operation of the act) also in the probation law effective in the District of Columbia. (36 Stat. 864.)

Yielding to none in respect for the judicial office, we would protect it if need be against the judge himself, to the end that there may be insured for it that high regard it ought always to enjoy. In short, we but urge the judges to put themselves in accord with the Constitution and laws they have sworn to uphold and enforce by awaiting statutory authority for parole or probation and refraining from attempts to reprieve, to pardon, or to indefinitely suspend sentences.

Part II.

REPLY TO BRIEF OF RESPONDENT.

A second brief, written by respondent in person, has been received since the completion of the above reply to the brief of Attorney Marshall. It consists chiefly of attempts to exhibit the alleged inadequacy and hardship of the present statutory system demanding minimum punishments.

Respondent complains of the Attorney General's expressed inability to cause to be paid the general expense incurred by respondent in these proceedings (brief, p. 3), as well as of the Attorney General's attitude in making an issue and asking for proof of the alleged details of practice (brief, p. 3).

The course pursued by the Attorney General is in the one case a matter of statutory observance in the disbursement of appropriations and in the other conforms to the orderly course of pleading. A further discussion of either matter is deemed unnecessary.

Respondent questions the form of remedy here sought, but announces his willingness to waive this feature. (Brief, pp. 2, 3.) This is beyond his power, for it involves a suggestion of lack of jurisdiction of this court. The procedure, however, is in exact accord in its every step with that approved by this court in *The United States, petitioner*, 194 U. S. 194. And though respondent thinks otherwise, the petition here seeks among other relief that which respondent insists alone would be proper, *i. e.*, to compel the issuance of a commitment.

Respondent endeavors to bind the Department of Justice to the practice by its acquiescence. (Brief, p. 7.) United States Attorneys have no authority to commit the Department of the Government in such matters. Some might act in one direction and others in the opposite. Casual letter requests from the department to judges ought not to weigh against the official communication of the Attorney General—the Department head—to Congress. Attorney General Miller on January 24, 1890, advised that—

> I am not aware by what provision of law a judge can suspend a sentence at all. On this matter, however, I express no opinion. (House Rep. No. 566, 51st Cong., 1st sess., vol. 2, 1889–90.)

Some judges were aware that the Department of Justice was challenging the power, for in a letter written by a Federal judge and before Congress in 1914, it is said:

> There has been considerable query raised by the Department of Justice with respect to

> the authority of the court to suspend sentence, and it has *up to the present time* depended upon the right of a court to allow a *sentence to be postponed*, or to let the defendant be discharged without sentence until after the term has expired and the case has lapsed.

No uniform acquiescence, nor indeed, any acquiescence at all against the Department of Justice can be established. On the contrary both judges and Congress knew that the Department was questioning and challenging the power. Of course, neither district attorneys nor the Department of Justice, nor its head, can alter the law to confer power where none otherwise existed.

After advancing contentions appealing to every impulse of mercy, respondent urges (Brief, pp. 8, 9) that courts ought not to be forced to resort to "subterfuge" and "expediency" to avoid the "unvarying and rigorous application of the law." Agreeing to this, we add that we do not understand how such a resort could ever be excused, much less be justified. A judge unable to resist the impulse to resort to such subterfuges and expediencies should not hold the office, for he can not faithfully discharge its duties.

Respondent upholds the action of the Pennsylvania judge who imposed a lesser term than the minimum prescribed by law (brief, p. 10), and, while protesting that he recognizes "a duty to adhere to statutory penalties," yet asserts that his court ought not to be "required to impose a sentence as a minimum very far beyond that which, independent of statute, the circumstances in hand peculiarly call for," and that

to confine Henahan five years (the minimum) "would be shocking, a miscarriage of justice instead of its due administration." (Brief, pp. 9, 10.) We confess to a difference in view as to rights and duties of judges so radical that we shall not attempt to reconcile it.

While he disclaims having capriciously or arbitrarily suspended execution (brief, p. 10), none the less has he done so; for, in a legal sense, an indefinite postponement during good behavior, because not warranted by the needs of judicial administration, is both capricious and arbitrary.

The suggestion that the *Wilson* case, 46 Fed. 648, is overruled by the *Adams* (*Allen*) case (brief, p. 11), is an error. The decision in the former, that an attempt to suspend a sentence is a void act, is in entire harmony with the decision in the latter that if such a void order be incorporated in a sentence otherwise valid, the valid portion is not affected thereby. The Circuit Court of Appeals in the *Adams*, or *Allen*, case upheld the Government's contention, and that contention was urged as a sequence of the position taken by the Government in this case.

The concession of respondent (brief, p. 13), that a practice otherwise improper may not be sustained in Federal courts merely because it follows a State court practice within the same district, so minimizes the importance of State decisions—especially those of his own district—that the Government contents itself with what was said in that regard in reply to the Marshall brief (Part I hereof).

His concession (brief, p. 16) that a "reprieve" is quite different from a "suspension of sentence," makes inapplicable all the common-law decisions cited in the Marshall brief and leaves the claim that the latter power existed at the common law without support in these authorities.

We are not surprised, therefore, that respondent finds that the most recent article published in the September–October, 1915, American Law Review by Barnett on "Executive, Legislative, and Judiciary in Pardon" reaches conclusions opposed to his claims here. (Brief, p. 7.)

Much of respondent's reasoning (pp. 19–23) assumes without argument or citation of authority that the practice was well established in the time of Hale and Blackstone. Quotations from these writers in either the Government's original brief, the Marshall brief, or the reply to the latter (Part I hereof) shows that such was not the fact. We can not acquiesce in the claim that trial courts are best equipped for the functions of mercy and that a court power to suspend is essential to deal with crime according to the modern idea. (Brief, p. 20.) We insist that nothing less accords with the modern idea than a procedure which hangs a sentence over a convict for the balance of his life to be enforced at any time at the will of a given judge or any of his successors in office. Were this view erroneous, however, respondent's concession that "Congress may legislate this particular attribute away" (brief, p. 21) carries the implied admission that it is not an inher-

ent elementary power of a "court" as that word is defined, and that if not inherent, congressional action is as necessary to bestow it upon a court as it otherwise would be to take it away.

We fail to understand respondent's assertion that Congress has not enacted a general parole law. (Brief, p. 22.) The act of June 25, 1910 (36 Stat. 819), is commonly so referred to, and seems to be such an act.

Part III.

There has also just been lodged with the clerk of this court a "Memorandum Submitted by the New York State Probation Commission." This refers only to the Sessions case (N. Y.), and the Marks case (Mass.). Assuming a necessary interdependence between suspended sentence and the probation or parole system, it argues the advantages of the latter, being in truth but a plea for the preservation of probation. Recognizing as we do its worth, and the legislative authority to establish such a system, this "Memorandum" needs no answer, save to say that as already pointed out the practice of suspended sentence is wholly unrelated to the statutory system of probation or parole.

Thomas Watt Gregory,
Attorney General.

John W. Davis,
Solicitor General.

Wm. Wallace, Jr.,
Assistant Attorney General.

December, 1915.

APPENDIX.

(Published in "Ohio Law Bulletin" November 15, 1915.)

NISI PRIUS AND SPECIAL TERMS.

State v. Radcliffe.

COURTS—CRIMINAL LAW.

[Franklin Common Pleas, October 9, 1915.]

STATE OF OHIO v. JOHN RADCLIFFE.

Courts Cannot Suspend Sentence in Felony Cases.

Courts have no inherent judicial power indefinitely to suspend sentences in felony cases, but their criminal jurisdiction is fixed by positive and irrevocable provisions of statute; Sec. 13706 G. C. authorizing suspension of sentence in cases where accused has never before been imprisoned for crime provides the only condition under which sentence may be suspended.

MOTION to suspend sentence.

Robert P. Duncan and *Franklin Rubrecht*, for plaintiff.

Timothy S. Hogan, Ray S. Bates and *C. B. Shook*, for defendant.

KINKEAD, *J.*

This case was tried and determined by verdict of a jury at the April term, 1915. Defendant was found guilty of burglary. In due course a motion for a new trial was made and overruled. Thereupon sentence was pronounced, record of all of which was duly made at that term. Thereafter, at the same term, on request of counsel, the court heard argument on application for suspension of sentence. At this time, after hearing arguments, the court informally expressed the opinion that it was doubtful if it possessed power to suspend sentence in such a case. Thereupon by agreement of counsel

an entry was put on at the April term setting aside the order overruling the motion of new trial. It did not actually refer to that part of the entry touching the sentence of the defendant to the penitentiary. The understanding or agreement was that briefs were to be furnished on the question of power to suspend the sentence.

A formal application is made for an order suspending the sentence. In its support reliance is placed upon the decision in *Weber* v. *State*, 58 Ohio St. 616 [51 N. E. Rep. 116; 41 L. R. A. 472]. In that case the defendant, under an indictment for keeping a room for gambling, was sentenced to imprisonment in the county jail for a period of ten days, and to pay a fine of $400, which was suspended. This was a misdemeanor.

In a *per curiam* report it was stated in the syllabus that:

> In a criminal case the court has power to suspend the execution of the sentence, in whole or in part, unless otherwise provided by statute; and has power to set aside such suspension at any time during the term of court at which sentence was passed. Whether such suspension can be set aside at a subsequent term is not decided.

The trial court in that case of its own motion at the same term at which the sentence was pronounced set the order of suspension aside, because the defendant violated its conditions.

In support of the present application, the case of *State* v. *Whiting*, 83 Ohio St. 447, decision without opinion is also cited. In that case the defendant was found guilty of the crime of cutting with intent to wound, a penitentiary offense. The sentence was suspended by the trial court and was affirmed by the Supreme Court, without report.

Decisions of courts derive their value as controlling authority from the reason and logic of the conclusion. In the *per curiam* report and the unreported decision there is nothing but the bare conclusion unsupported by any statement of the reason or grounds therefor. It is merely held that the court has inherent power to suspend a sentence unless otherwise provided. The unreported decision was made since the enactment of Sec. 13706 G. C. The inference is claimed therefrom that such power is supposed to exist in spite of the statute which regulates the conditions under which a sen-

tence may now be suspended, and that the court must have so considered it.

My brother Dillon of this court, *Lee, In re*, 16 Dec. 533 (3 N. S. 533), held that:

> In the absence of a statutory enactment to the contrary, the power of a court to suspend execution of sentence during good behavior, or to revoke such suspension, is not impaired or limited by the passing of the term in which the suspension was made.

This decision was with reference to a suspension of sentence by a police court, and was entered upon the authority of *Weber* v. *State*, 58 Ohio St. 616 [51 N. E. Rep. 116; 41 L. R. A. 472].

There is authority in some jurisdictions which sustains the view that a judge or court, in the exercise of inherent power may suspend a sentence. Conspicuous among the precedents on this side of the question is *People* v. *Court of Sessions*, 141 N. Y. 288 [36 N. E. Rep. 386; 23 L. R. A. 856], which asserts that the power to suspend a sentence finds its support at common law which has been the uniform practice of the courts and is supported by numerous adjudged cases as well as by writers of acknowledged authority on criminal jurisprudence. The inherent power of the common law courts was thus relied upon though there was in that state a statute which authorized a suspension. The case can not well be regarded as an authority because of the existence of the statute, and for the further reason that the common law doctrine whatever it was, cannot have controlling effect in this state for reasons hereafter stated.

The cases of *State* v. *Crook*, 115 N. C. 760 [20 S. E. Rep. 513; 29 L. R. A. 260]; *State* v. *Addy*, 43 N. J. Law 113 [39 Am. Rep. 547]; *Gibson* v. *State*, 68 Miss. 241 [8 So. Rep. 329]; *People* v. *Patrich*, 118 Cal. 332 [50 Pac. Rep. 425]; *Williams* (*Ex parte*), 26 Fla. 310 [8 So. Rep. 425], and perhaps some others support the doctrine of inherent power.

The greater number of decisions in the several states do not support the rule of inherent power. One of the best considered opinions is that in *Clendenning, Ex parte*, 22 Okl. 108 [97 Pac. Rep. 650; 19 L. R. A. (N. S.) 1041; 132 Am. St. Rep. 628], which involved a question of power to

revoke an order of suspension, after lapse of time of sentence and after term and the right to issue commitment.

It is stated by the court that:

> Every case wherein the question is squarely presented and passed upon, and the courts have given it the care and attention its importance deserves, holds, practically without dissent that in passing sentence on a person convicted of an offense the court has no power to provide that the imprisonment of the defendant shall begin at some future indefinite time, depending on the happening of an uncertain contingency; and an arrest under such conviction, made after the expiration of the term of imprisonment named in the sentence, and after the term, is illegal.

People v. *Barrett*, 202 Ill. 287 [67 N. E. Rep. 23; 63 L. R. A. 82; 95 Am. St. Rep. 230], is a recent well considered case. The power, which is universally conferred, to delay pronouncing judgment for a reasonable time, to hear and determine motions for new trial, or to give time for perfecting an appeal or writ of error, is mentioned as the only power which a court has; power to indefinitely suspend the pronouncing of sentence, or its execution is denied. To allow such a power, it is pertinently observed, would place the criminal at the caprice of the judge.

It is further said:

> That whatever the common law practice might have been, the legislature has adopted a different method to give persons convicted of crimes the opportunity to reform, by providing a system of parole and boards to administer the same. In view of the expressed policy of the legislation of this state we are disposed to hold that the trial courts do not have the power to suspend the imposition of the sentence indefinitely after conviction, or to release the prisoner.

In *Tuttle* v. *Lang*, 100 Me. 123 [60 Atl. Rep. 892], it was remarked:

> In such case (having suspended sentence) having completed its judicial functions, it has voluntarily surrendered all further control over the case and person.
>
> After sentence has been pronounced in a criminal case the court cannot, as a matter of lienency to the defendant, suspend indefinitely its execution.

Webb, In re, 89 Wis. 354 [62 N. W. Rep. 177; 27 L. R. A. 356; 46 Am. St. Rep. 846].

In *Clendenning, In re, supra*, it is said:

> Were such a course permitted to trial courts, and did it receive the sanction of this court, it would make the enforcement of the law a mere farce, bring all courts in disrepute.

Grundel v. *People*, 33 Colo. 191 [79 Pac. Rep. 1022; 108 Am. St. Rep. 75]:

> In the absence of a permissive statute, the indefinite postponement of sentence upon one convicted of crime deprives the court of jurisdiction to pronounce sentence at a subsequent term, and is, in effect a discharge of the prisoner.

State v. *Hunter*, 124 Iowa 569 [100 N. W. Rep. 510; 104 Am. St. Rep. 361]:

> An indefinite suspension of a sentence on conditions is, in practical effect, a conditional pardon.

In *People* v. *Reilly*, 53 Mich. 260 [18 N. W. Rep. 849], it is said:

> If such a power can be exercised by a judge, it incorporates into our administration of the criminal law the "ticket-of-leave" system of the English judicature without its surveillance and checks, and places the criminal at the caprice of the judge, subject to be called up for sentence at any time. If the judge can delay the sentence one year, I do not see why he may not fifteen years.

United States v. *Wilson*, 46 Fed. Rep. 748:

> Courts have no power to suspend sentence except for short periods pending the determination of other motions, or considerations arising in the cause after verdict.

A court may delay pronouncing judgment in a criminal case for a reasonable time to hear and determine motions for new trial, etc., or to give the defendant time to perfect an appeal, or writ of error, or for other proper causes; but it cannot suspend indefinitely the pronouncing of sentence or the execution of judgment. If a judge can delay the sentence one day he can delay it for any length of time. *People* v. *Barrett, supra*.

"The authority to wholly relieve parties from a conviction for crime is not given to the courts but belongs to the par-

doning power." *People* v. *Blackburn*, 6 Utah 347 [23 Pac. Rep. 759]; *People* v. *Brown*, 54 Mich. 15 [19 N. W. Rep. 571].

The power to indefinitely postpone the punishment prescribed by law by suspending the execution of a sentence is the power to perpetually prevent punishment, a power which, under the provisions of the constitution does not exist in the courts. *Neal* v. *State*, 104 Ga. 509 [30 S. E. Rep. 858; 42 L. R. A. 190; 69 Am. St. Rep. 175]; *Miller* v. *Evans*, 115 Iowa 101 [88 N. W. Rep. 198; 56 L. R. A. 101; 91 Am. St. Rep. 43].

The case of *Commonwealth* v. *Mayloy*, 57 Pa. St. 291, is instructive in that it makes clear the essential distinction between the inherent power of the common law courts to suspend a sentence and the power of our state courts in the matter. The material difference between the power of common law courts and that of our courts is made clear. The difference in the practice is shown to demonstrate how improbable it is that our courts should possess such inherent power. The argument is "that after the judgment or sentence is pronounced, which is but the judgment of the law, was intended, and ought to be final so far as the courts are concerned, with the execution of the sentence which follows, courts have nothing to do, nor ought they."

We have reviewed some of the authorities bearing on the question. The suggestions contained in views expressed show that the trend of opinion and better reason is against the exercise of such power. It seems entirely clear that basic reasons underlying the common law rule are inapplicable to the conditions under the constitution and statutes touching judicial jurisdiction and power in criminal cases. Common law doctrines may be adopted and applied only when conditions so warrant, and not where the whole plan of criminal procedure, jurisdiction, and judicial power has been constructed on a wholly new basis. Courts must be cautious as well as zealous in the exercise of power. The function of mercy, clemency, parole, probation, or suspension has been carefully designed, to be placed in hands of other officials than the courts. It is true that nothing specially is said about the question of inherent power. Nothing, it seems, can more effectually demonstrate the want of such power than our constitution and statutes.

This brings us to the precise point of distinction between the common law jurisdiction over crimes and the constitutional and statutory jurisdiction of our state.

The constitution creates judicial power, but does not prescribe any jurisdiction in criminal matters. There can be no judicial power without jurisdiction. If the jurisdiction prescribed by statute excludes all judicial power exercised by the judiciary in criminal cases, how can any inherent power be exercised in disregard of statutory penalty, and regulations concerning the assessment thereof? Article 4, Sec. 1, of the constitution, vests judicial power in the several courts,—embracing the court of common pleas, the one possessing original jurisdiction in criminal cases. Art. 4, Sec. 4, of that instrument also provides that: "The jurisdiction of the court of common pleas and of the judges thereof shall be fixed by law."

No jurisdiction whatever is conferred on the common pleas court by the constitution in criminal cases, and it can exercise none until conferred by law, by statute. *Stevens* v. *State*, 3 Ohio St. 453; *Allen* v. *Smith*, 84 Ohio St. 283 [95 N. E. Rep. 829; 24 Ann. Cas. 611].

In deciding the question whether the court has inherent power to suspend sentence, the distinction between judicial power and jurisdiction should be kept in mind. Judicial power of necessity can be exercised within the scope of jurisdiction and not beyond it.

A comparison of judicial power as exercised within the scope of the statutory jurisdiction in criminal cases with that exercised in civil cases will clearly illustrate the distinction sought to be made. It will show how such power in civil matters is exercised according to the course of the common law, whereas in criminal cases it is to be exercised without regard to the common law, but strictly in accord with the provisions of the statutes. Having no judicial power in the latter class of statutes except as derived by statutes, courts can not exercise any power derived from any other source. Common law crimes and procedure have been abrogated which takes away all judicial power heretofore existing at common law, not specially provided for by statute. Judicial power in civil cases is largely dependent upon the common law, while in criminal cases it is not governed by the common law at all.

Jurisdiction in civil cases is conferred in part by constitution and in part by statute. Section 11215 G. C. provides that this court "shall have original jurisdiction in all civil cases where the sum or matter in dispute exceeds the original jurisdiction of justices of the peace."

From the nature of things civil jurisdiction could not be particularly stipulated or prescribed for as is done in criminal cases. By general understanding in the adoption of our constitution and civil code of procedure, jurisdiction in civil cases is to be exercised according to the course of the common law. In rendering judgment in such cases, the court is to be controlled by the common law; within the limits of procedural limitations as to terms and other matters it may modify, change or set aside its judgment once rendered. That is, in concluding upon what judgment is to be given the court exercises the inherent judicial power of the common law courts, unrestrained by any limitations prescribed by statute, except such as may relate to formal matters not having any relation to the substance of judicial power.

In criminal jurisdiction we have never had any common law crimes nor any common law jurisdiction. This everybody knows to be axiomatic. The judgment of the court, in each case of conviction by verdict or plea of guilty, is fixed by positive and irrevocable provisions of statute. The so-called inherent power of the common law courts has nothing whatever to do with it. The court has no will or wish, and no discretion in respect to whether a sentence shall or shall not be pronounced, or whether it shall or shall not be enforced.

When the judicial sentence is pronounced by the court, the judicial power becomes *functus officio*, and all that must thereafter be done or that may be done is prescribed by positive provision of statute. Strict construction of criminal statutes excludes the exercise of any power not therein expressly provided for. When the sentence is entered the prisoner must be disposed of as the statutes provide. To permit the court to qualify its order of sentence by conditions not authorized by statute, would result in disregard of the acts of the legislature. When a sentence is pronounced jurisdiction ceases, unless the case be one within the statute authorizing a suspension.

To permit the judicial power to suspend a judgment required to be rendered by the mandatory provision of the statute would be to override the power of a co-ordinate branch of government which is vested with exclusive power to fix the jurisdiction and power of courts. It will permit a judge to substitute its judgment or caprice for the legislative function.

To sustain an inherent power of courts to suspend a sentence mandatorily required by statute would be an assumption of power, pure and simple. Criminal penalties as prescribed by statute represent the preponderant public opinion, as expressed by the legislature, which cannot be disregarded or modified by the judiciary, no matter how high and lofty its motive may be in any particular case where there is an inclination to suspend a sentence.

As before stated, the power of this court in civil matters is inherent in it as a common law court, to be exercised according to the common law doctrines. Its power to decide and adjudge on the merits of a case, is not prescribed by constitution and statute. Its final judgment is controlled or governed by common law doctrines and rules which are not express in the sense that a penalty of a criminal statute is.

In other words, the judgment to be rendered in the civil case may, in a sense constitute the individual judgment of the court, without control of specific requirement or limitation.

But the judgment and sentence in the criminal case is not the individual opinion or judgment of the judge or court, but is that of the legislature. Before the indeterminate and probation or suspension statutes, the judge or court had no discretion whatever, and was required to impose a sentence between the minimum or maximum penalty. Before the indeterminate statute, the court was bound to pronounce sentence within the statutes, the minimum or maximum term, or a term between the two. The enactment of the indeterminate law furnishes conclusive evidence that it was never intended that the court was to exercise clemency. Under these statutes the duty of sentencing according to their provisions is mandatory, the only discretion the court has being to suspend a sentence when conditions warrant it according to conditions fixed by statute.

Under Sec. 13706 G. C., the court has discretionary power to suspend the execution of a sentence, and to place the de-

fendant on probation when "the defendant has never before been imprisoned for crime."

What would be the use of enacting such a statute if it was settled that courts had inherent power to suspend a sentence, the terms of which are prescribed by statute. If a court could prescribe the conditions of the order of suspension, why the necessity of detailed provision as to the conditions of suspension and of the regulation of those so placed on probation.

All these statutes and the whole criminal code, as well as the difference between judicial power in criminal and civil cases, in no uncertain language expressly and inferentially, demonstrate, in my judgment the utter want of the inherent power of suspension.

Such inherent power as it is conceded courts have, as in contempt and disbarment, bears no analogy to the claim of inherent power asserted in this case. Such power exists only for the purpose of maintaining the dignity and power of the judiciary.

There were cogent reasons for sustaining the inherent power of common law courts to suspend sentence. The practice had its origin in the hardships resulting from "hard and fast" rules of procedure, under which there was no power to grant a new trial and when the verdict could not be reviewed by a higher court, and where it was doubtful whether the accused could have the benefit of clergy. Arbitrary reprieves were granted in such cases, and in certain cases where youths were convicted of their first offense, the power belonging to every tribunal invested with authority to award execution in a criminal case. Hale P. C. ch. 58, p. 412, 1 Chitty Cr. L. (1st ed.) 617, 758.

Under our statutes the court is given power to pronounce sentence and to suspend in cases where there has been no previous conviction and imprisonment. The power to grant reprieve or pardon however, is invested in the executive exclusively.

However, so much some opinions may endeavor to distinguish a suspension of sentence from a pardon, the stubborn fact remains that a suspension of sentence upon certain conditions operates as a release from imprisonment. It is said that "the suspension of the sentence simply postpones the

judgment of the court temporarily or indefinitely, but the conviction, etc., remain and become operative when judgment is rendered, "while pardon blots out of existence the guilt." *People* v. *Court of Sessions*, 141 N. Y. 288 [36 N. E. Rep. 386; 23 L. R. A. 856].

The majority opinion is to the contrary that the suspension without authority is in effect a full release, because if there is no power to suspend, there can be no subsequent power to vacate the suspension and enforce the penalty.

The view taken by the court in *People* v. *Barrett*, *supra*, aptly expresses the situation in this state. The state had adopted a different method from that of the common law to give persons convicted of crime the opportunity to reform, by providing a system of parol, and boards to administer the same, as well as of pardons, and suspension and probation.

There is good and sufficient reason for not regarding *Weber* v. *State*, *supra*, as authority. Sec. 13706, G. C., specially provides the only condition under which a sentence can be suspended. It operates both as a grant and limitation of the power of suspension. A sentence may only be suspended in accord therewith.

I suppose it will have to be admitted that the conclusions of the court in *State* v. *Whiting*, *supra*, are not in accord with those contained in this opinion. My experience in following decisions in unreported cases has not been very satisfactory. I adopted a reported opinion of the trial court on the question of embezzlement of public money, which was affirmed by the Supreme Court. But the court passed over the unreported decision in profound silence laying down a new rule and reversing my conclusion. So in this case I chose not to regard *State* v. *Whiting* as an authority. No one ever knows why an unreported decision is made. The court might have considered that it would have been futile to reverse the lower court because the prisoner had been turned loose in contravention of statute and there was no power to recommit him. That was the effect of the act of the trial judge, in my opinion, and such is the rule of decision in other states. That was true because the judicial act became *functus officio*. The doctrine of *Weber* v. *State*, *supra*, could no longer be relied upon because the statute had otherwise provided that a

sentence could only be suspended in case the accused had not previously been imprisoned.

I have thought it unnecessary to consider in detail the several statutes relative to the penalty to be assessed for each crime, to show the mandatory character therefor. It is important, however, to specially note the provisions of Sec. 13694 G. C. This provides that the court must inform the defendant of the verdict and to ask if he has anything to say why judgment of sentence shall not be pronounced against him. It requires also, if the answer is in the negative, that "The court shall pronounce the judgment provided by law."

It is difficult to perceive, therefore, how a court, by the exercise of power conferred by neither the statute nor the constitution, and as part of the sentence of the judgment required by law, can impose conditions of suspension in derogation of the statutes relative to probation, such as was done in *State* v. *Whiting*, the unreported decision. In that case the court imposed terms of probation entirely contrary to the statutory provisions contained in Secs. 13709 to 13715, which provide for a complete system of probation by the present state board of administration. The order that was made in *State* v. *Whiting*, *supra*, took the matter out of the hands of the state officials, with whom the legislature had entrusted the province and duty with respect to probation.

It is also pertinent to refer to the provisions of Sec. 2210 R. S., which provide that the effect of an order of suspension of sentence is to place the defendant on probation, under control of the board of managers of the institution. How, then, can a court suspend a sentence upon such conditions as are named in *State* v. *Whiting*, *supra*, which is in derogation of the terms and conditions of the section referred to?

My conclusion is that the court has no statutory or inherent power to suspend the sentence in this case.

At the time of the conviction of defendant I was inclined to suspend the sentence if it could be legally done, because he was under the influence of liquor. On maturer consideration, however, the story of the defendant appears so unreasonable as not to be worthy of belief. If he had been innocent he would not have fought the policeman as he did. An in-

nocent man would have acted differently, it would seem, in reliance upon the potency of innocence. I do not believe the officer would have made a wanton attack on the defendant nor do I believe that he did violence to the prisoner until the latter made it necessary.

The court declines to suspend sentence, both because it has no power, and for the further reason that it would injure the cause of justice to do so.

The former order vacating the overruling of the motion for a new trial having been made at the preceding term, an order may now be made overruling the motion, and the defendant is sentenced to an indeterminate term in the Ohio Penitentiary.

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In the Supreme Court of the United States.

OCTOBER TERM, 1915.

NO. 12, ORIGINAL.

EX PARTE: IN THE MATTER OF THE UNITED STATES, PETITIONER.

BRIEF FOR THE UNITED STATES IN REPLY TO BRIEF OF RICHARD W. HALE ET AL.

A brief filed in support of the practice in the First Circuit advances one new idea, namely, that the power to bind over to keep the peace justifies indefinite suspension of the execution of a criminal sentence. The contention is indefensible.

The power to require security for keeping the peace is a similar one and is a check on a person who if at large might otherwise endanger the peace of a community. It is commonly exercised by justices of the peace to restrain threatened violence. Its exercise is authorized by statute in probably every State, and it is the very power given to Federal courts by section 727, Revised Statutes. While ordinarily exercised in advance of the commission of crime, it is true that, at the common law, it was sometimes

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exercised even as late as the imposition of final sentence; and when so exercised it was always in addition to the punishment prescribed by law for the specific crime, and also upon a finding that after the expiration of the prison term the convict might still be a menace to the public peace.

The faculty here assumed *relieves* of punishment altogether because of the alleged *virtues* of the defendant; whereas the power to compel keeping the peace, when exercised at the time of sentence, imposes a *burden* additional to the full regular sentence, and this because of the enduring dangerous impulses of the convict. The common law decisions cited (Hale brief, pp. 14 and 17) demonstrate the distinction just stated.

In *Rex* v. *Hart*, 30 Howard State Trials, 1344, the defendants Hart and White were sentenced for 18 calendar months and for an additional 18 months, and it was provided after the expiration of the term of both these sentences each defendant must give a bond for good behavior for a period of five years commencing at the expiration of the last prison term. The Attorney General said the reason for the bond requirement—

> was to guard against future libellous publications, to protect the public peace against future probable invasions of it; (1337)

while the Lord Chancellor said:

> the crime of which these two persons were convicted was one of the most dangerous description. (1344)

They were convicted of a series of libels against the administration of public justice and the trial by jury in England, and against one of the judges and certain jurors.

Regina v. *Dunn*, 18 L. J. M. C. 41 (the case could not be found under the reference given on p. 15 of the Hale & Grinnell brief), involved a conviction of perjury, by means of which, under pretense of being a creditor, Dunn threw the Baroness Burdett Coutts into bankruptcy. The sentence was that Dunn be imprisoned 18 months and at the expiration of the prison term he give a bond to keep the peace and be of good behavior toward all, and especially toward the Baroness, for a period of 2 years commencing on the expiration of the prison term. A motion to arrest this judgment was interposed on the ground that it might produce perpetual imprisonment. It was held that in cases of *misdemeanors* the Queen's Bench might require security to keep the peace.

In *Rex* v. *Draper*, 30 How. State Trials, 1129, it appears that Col. Draper's motion for a new trial was denied November 10, 1807, and he was required to appear for the sentence when the court should order. On November 13 the cause was moved for judgment upon the 18th instant. On the latter date defendant appeared for judgment with elaborate affidavit showing. The Attorney General requested time to produce a counteraffidavit and the cause was ordered to stand over for that purpose until November 23, when the defendant appeared and was

sentenced to $500 fine and three months' imprisonment, and because of the "obstinate persistency in the libels" to give, at the expiration of the term of imprisonment, a bond of $2,500 to behave well for a period of two years thereafter.

In *Queen* v. *Richardson*, 8 Dow. Pr. 511, plea of guilty was tendered upon the express condition precedent that defendant should be released on his own recognizance and never called for sentence if he discontinued the libels. The plea thus conditioned was accepted. The right of the court to take such a plea was not challenged. It was insisted, and the court held, that until the condition was breached defendant could not be taken for imprisonment under that plea.

The State decisions referred to in the brief may be similarly distinguished.

In *Commonwealth* v. *Duane*, 1 Binney's Refs. 98, the defendant before preliminary examination in the Mayor's Court on the charge of publishing numerous libels, refused to give a peace bond. On habeas corpus the court upheld him, saying that the peace-keeping power did not apply to such a case, and further saying that the power was meant to protect against those "supposed to be dangerous to the community."

In *United States* v. *Greiner*, 4 Phila. 403, the question was, could a United States Commissioner, on a preliminary hearing upon a treason charge, bind the accused over to appear in the State of Georgia for trial when, because of its secession, no speedy trial

in United States courts could be there given him. It was determined that he could not be constitutionally bound over, whereupon the court proceeded independently of the specific criminal charge and under section 727, Revised Statutes, and on account of his apparent violent purposes, bound him over to keep the peace.

In *Estes* v. *State*, 2 Humph. (Tenn.) 498, it was held that a single act of gaming, unaccompanied with circumstances of aggravation, was not such a misdemeanor as would authorize binding the defendant to keep the peace, and in this case the defendant plead guilty to the indictment for gaming and was fined therefor. The court characterizes the peace-keeping power as "preventive justice" and distinguishes it from "punishing justice." This distinction is concluded in Tennessee by the case of *Spencer* v. *State* (1911), 125 Tenn. 75, wherein, in speaking of suspension of execution of sentence, the court said:

> It can not be stayed merely for the purpose of enabling the trial judge to hold the sentence *in terrorem* over the head of the prisoner to secure future good behavior.

(See our Original Brief, p. 27, and Reply Brief, pp. 9–10.)

Reading section 727 in parallel with section 722, R. S., it becomes apparent that the power bestowed by the former was never intended to neutralize the execution of sentence as contemplated in the latter.

(Sec. 722, R. S., is quoted in our Original Brief, p. 12.)

The reference to Highmore relates only to bail and is wholly unrelated to this question.

No other authorities are cited in the attempt to apply the peace-keeping power.

Additional common-law authorities are cited (Hale brief, 12–13) as in support of the power to indefinitely suspend execution.

In *Rex* v. *Bishop*, 1 Strange 9, the defendant was brought up in due season for judgment on the verdict, when the language quoted (in the brief, p. 11) was employed. The report of the case shows that he was in such a condition as that he died within a few days thereafter. It is evident that the court was of the opinion that the shock attending the imposition at that time of an adequate sentence would have endangered his life, and the postponement was but temporary to overcome that condition. It was such a postponement as would have normally occurred in the due administration of justice if physicians had ordered the defendant into a hospital between verdict and appearance for sentence.

In *Burgess* v. *Boetefeur*, 7 Manning & Granger, 481, while the indictment was returned at a session beginning October, 1842, it does not appear that it was returned in that month, and neither the duration of the court session nor the date of the plea to the indictment is shown. The postponement was

merely to accomplish another judicial action—*i. e.*, the abatement of the disorderly house (the maintenance of which formed the subject of the indictment); and as soon as the house was abated the sentence was imposed. No question as to power of postponement was raised. The suit was a *qui tam* action to recover an amount said to be due under a statute from those who were overseers at the time of the "conviction," and the court held that the defendant was not convicted until he had been sentenced.

In this connection we quote the language of this court in its opinion in *United States* v. *Mayer*, 235 U. S., 55, 70:

> In a Federal court of competent jurisdiction final judgment of conviction had been entered and sentence had been imposed. The judgment was subject to review in the appellate court, but so far as the trial court was concerned it was a finality; the subsequent proceeding was, in effect, a new proceeding which by reason of its character invoked an authority not possessed.

It is urged that a decision that the practice is unconstitutional will prevent parole and probation laws. We have shown in our Reply Brief that no such result could possibly ensue. In thus claiming the power as of kin to parole and probation he thereby opposes the views expressed in some parts of the other briefs filed for respondent. If it be a phase of parole or probation, it can not be a phase of the peace-keeping power; nor could its exercise be unconstitu-

tional unless parole and probation were themselves a phase of the pardon power. This contention therefore, confuses all distinction between pardon, parole, peace-keeping and suspension of execution powers, and includes them all in the same family.

If, as stated (Hale & Grinnell brief, pp. 24–25), there be in Massachusetts alone 200 convicted persons who have never responded to the law's demand, though never lawfully forgiven for their misdeeds, each of these persons has been long owing service of sentence to the State, and every convict now confined in jail has as much right to be at large as they. Their good fortune should not prevent the administration of the law.

Whatever the rule in Massachusetts as to mandamus to compel the imposition of sentence (Hale & Grinnell brief, p. 8), this court has determined that this remedy will lie not only in case of refusal to administer the law, but in case of negligent delay in the administration thereof. *Ex parte Crane*, 5 Pet. 190, 192; *ex parte Bradley*, 7 Wall, 364, 375. (Our brief in support of petition for mandamus, p. 9.)

We are not concerned with the Massachusetts practice in the State courts. In *United States* v. *Mayer*, *supra*, this court quoted approvingly from *Bronson* v. *Schulten* 104 U. S. 410, as follows:

> And this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a state or the practice of its courts. (69)

The Federal courts must all alike have or be denied this faculty. The practice in any single State can not control.

In speaking of the Massachusetts practice it is said that the court keeps control of the cause by declining to make an entry in its records of the acceptance of a plea of guilty, or the adoption of a like verdict. *Acceptance* is not essential to the validity of a plea of guilty, or of any other plea than "*nolo contendere.*"

The other matters have been already covered in the original and reply brief for the Government.

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JANUARY, 1916.

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Supreme Court of the United States.

October Term, 1915.

No. 12, Original.

EX PARTE THE UNITED STATES.

BRIEF IN SUPPORT OF THE PRACTICE IN THE FIRST CIRCUIT.

This brief is arranged as follows:

STATEMENT.

A. Difference between case at bar and First-Circuit practice.

B. Description of First-Circuit practice.

ARGUMENT.

General.

I. The object is laudable.

II. It is one proper to be sought through the exercise of the judicial power.

III. It is not unconstitutional as executive power.

IV. It needs no statute if it is "common ground."

V. Text-books and additional precedents indicate that it is historically sound.

VI. It is the same in substance as the common-law power to bind to "good behavior."

Local.

VII. It is supported by local practice.

VIII. There are local precedents of general weight.

Consequences.

IX. Consequences of a decision against the practice.

X. *Conclusion.*

Statement of the Case.

A. Difference between Case at Bar and First-Circuit Practice.

In the case at bar, *United States* v. *Killits*, there is called in question a criminal judgment or sentence entered by the District Court for the Northern District of Ohio, coupled with an order suspending its execution. The contention of the Government is that the record is separable into two parts, and the latter part void. The order represents the practice of the Northern District of Ohio.

The practice in the First Circuit is as follows:

After a plea of guilty, or a verdict of guilty, the Court does not enter any judgment or sentence. It postpones the cause and admits the defendant to bail.

The object in both cases is to create a probationary period during which the Court can become wiser before deciding whether and with what severity to execute a sentence. In both cases the ultimate purpose is to make the punishment suffered by the offender as suitable as possible to the offense. This involves not only making the punishment suitable to the offender, but also suitable in its effect as a deterrent power. But while the purpose is the same the practice is substantially different from that in Northern District of Ohio. We do not concede that our practice is to stand or fall with the decision of this case, but we feel and submit that the real issue ought to be the object, and not

merely the Ohio practice. Hence this brief is filed to make sure that both the object and the practice in our Circuit shall stand or fall after the Court has had as much light upon the general situation as is possible.

B. Description of First-Circuit Practice.

In the First Circuit, in the Federal Courts, the practice in the various districts is substantially uniform. It is also substantially in accordance with that part of the practice in the state courts which exists at the common law, independent of statute.

We shall first briefly describe the practice in the First Circuit. Or rather, as the other Districts are comparatively free from Federal crime, we shall describe the practice in the Massachusetts District as fairly typical.

In this Court cases often occur in which the judge believes that neither an immediate prison sentence nor an immediate fine — which often amounts to a short prison sentence — is in the best interest of the United States. In these cases a plea or verdict of guilty is taken and recorded, but no entry is made accepting or adopting that plea or verdict in any way, and the case is continued without any judgment; that is to say, without sentence. The case being continued, the defendant is admitted to bail. In suitable cases he is required to furnish sureties, but generally the bail are not persons whose pecuniary responsibility is important. They are chosen for their fitness to have that custody of the offender which common-law bail always have, and they are chosen as persons who are likely to be able, in consequence of such custody or supervision, to give intelligent information about the offender. It

is hoped that their influence will cause some amelioration of his behavior.

Until the actual sentence the Court never makes any final decision as to whether it will sentence at all; and if so, as to whether the punishment shall be fine or imprisonment, minimum or maximum. These functions, which require the highest judicial capacity and power, are not finally exercised. Should mandamus be brought to stop the practice in Massachusetts, it would, for the reasons above indicated, be mandamus to require the exercise of these functions at a particular time.

The Assistant United States Attorneys for the District, and other persons connected with prosecutions, have been generous in giving their time in such cases. Helpful reports are secured from them. Voluntary service is also gratefully received from the probation officers of the Superior Court for Suffolk County, Massachusetts, and from other people with similar training. There have been cases of unusually young defendants, and, in these, persons connected with the Juvenile Court of the City of Boston have also freely given important and voluntary service. In every case which arose before the present case began, the proceedings have had the assent of the United States Attorney.

This has been the practice of the United States District Judge and his predecessors in office for at least sixty years; and until the present discussion no question has ever been raised as to its legality. In the case of *United States* v. *Margaret Mulhall*, on June 2, 1914, the United States Attorney for the District stated in open court that the Attorney General of the United States requested the exercise of the power to suspend judgment and sentence.

The only doubt which has ever been expressed has been upon the question of whether there was a right to continue a case for sentence if the District Attorney should move that sentence be imposed. This doubt was expressed upon the question of what was the common law of the subject; that is to say, the law common to both state and Federal Courts. As will appear by a later citation, the doubt has been resolved in the state criminal trial court, and it is the established practice of the state, independent of statute, that the District Attorney is not entitled to insist upon sentence. But as the United States Attorney for the Massachusetts District has usually been content with the views of the trial judges upon the question of the time and amount of punishment, the question has not arisen in the Federal Courts. The practice has rather indicated that the United States Attorney considered it to be a duty of his office not to move for sentence if he thought that the imposition of sentence was not in the true interest of the United States.

In the Massachusetts District the indictment of defendants under twenty years of age by the United States grand jury is not an uncommon thing. In one case within the last three years the defendant was under sixteen years of age. In another case a gang of boys between sixteen and nineteen years were indicted for the larceny of brass to a small amount from a shipment of goods moving in interstate commerce. Some of the boys were living at home, had no previous criminal record of any kind, and were plainly led into the crime in question by older boys and bad associates. The District Judge in the particular case was satisfied that a fine would amount to a jail sentence and that any

sentence in jail would be reasonably certain to ruin some of the boys.

Argument.

I. The Object is Laudable.

In the preface to the Massachusetts Probation Manual, edition of 1914, it is said:

> "Massachusetts has been called the 'home of probation' . . . The practice antedates the statutes . . . The statutes have indeed been chiefly the record of an accomplished idea."

In Sixth Annual Report of Massachusetts Commission on Probation (1914), at page 17, the system is described:

> "The probation service deals with human material that has not been stamped as criminal. It undertakes to build out of this a respect for law and correct personal conduct before the difficulty of that task has been heightened by penal experience."

The value of probation is scarcely matter which needs argument to this Bench.

II. The Object is Proper to be Sought through the Exercise of the Judicial Functions.

We do not understand that the Attorney General denies this or asserts that either probation or parole established by statute would be void as giving to courts executive power.

It is well established that trial by jury, to which every criminal defendant, as well as the parties to a

civil action, is entitled, is not a trial merely by twelve men. It is a trial in which the court has an integral function to give judgment.

Capital Traction Co. v. *Hof*, 174 U.S. 1, at 13–16.

The verdict of the jury is not the judgment of the court. It may be set aside. Even in a criminal case it requires exercise of the judicial power to make it effective.

What are the requirements for the particular exercise of this power? The judge knows that, if exercised to its full length, it sends the defendant to jail. Now if the defendant is entitled to a pardon, as, for instance, an informer, the judge knows that it is a breach of his duty to enter a sentence. Except in the rare cases where only one penalty, or punishment, can be inflicted, the judge knows that he must exercise the judicial power and the judicial mind in determining what the sentence shall be. In some cases the judge knows that he ought to allow time to arrange a pardon. The judge knows that it is his duty to inform himself with regard to the character of each prisoner, and also with regard to the question of what deterrent effect the punishment of the particular prisoner will have upon the community as a whole.

The object of judgment in a criminal cause is sometimes analyzed by saying that sentences are (*a*) partly for punishment; (*b*) partly in the hope of reforming the particular criminal; and (*c*) imposed in order to deter others from committing the same or similar crimes.

And we submit that the mere statement of the conditions surrounding the function of imposing a sentence

conclusively proves that both whether and when to exercise it are discretionary questions of judicial power and jurisdiction requiring a high order of discretion, and that mandamus will not lie to compel the exercise of this power at a particular time.

See *Rinado* v. *Lummus*, 205 Mass. 155, at the foot of page 156, to the point that it is the sentence which is the judgment. Also —

Com. v. *Weymouth*, 2 Allen, 144.
Com. v. *Hayes*, 170 Mass. 16.
Com. v. *Foster*, 122 Mass. 317, at page 323.
Keith v. *McCaffery*, 145 Mass. 18, at page 19.
Noyes v. *Manning*, 159 Mass. 446, at 447.
Com. v. *O'Brien*, 175 Mass. 37, at pages 39–41.

The relative functions of the district attorney and the court in these matters are discussed by Judge MacPherson in —

United States v. *Linnier*, 125 Fed. 83, at pages 85–87.

III. The Executive Power Does Not Exclude Such a Judicial Function.

"Reprieve," we say, is not a word which is broad enough to cut down the judicial power as a matter of constitutional necessity. Should the contrary be true, it would necessarily follow that the courts must declare unconstitutional the entire body of statutory law throughout the country which creates and develops the modern system of probation, suspended sentence, and

indeterminate sentence. While the question would technically arise under clauses of the state constitutions, those clauses ought to be interpreted in the same sense as the Federal Constitution.

The principal briefs discuss the historical question of whether at the common law a discretionary reprieve was exclusively the function of the king. On this subject we venture to touch very briefly. The main question before the court for decision being with reference to the exercise of the judicial power at the present day, we think it would be unfortunate to attach much weight to the notorious subordination of the judiciary to the prerogative which existed before 1688. Yet the various books — such as "Pleas of the Crown" — which are cited upon the subject reflect strongly that view of the prerogative. To our minds the lesson of that period is quite different from what it is sought to prove by such quotations. Take, for instance, Bishop Burnett's account, in his "The Life and Death of Sir Matthew Hale," of the way the author of Hale's "Pleas of the Crown" behaved on the bench. The biographer gives, as an illustration of Lord HALE'S "justice and courage" (pp. 30, 31), that when he was acting as a judge, in the time of Cromwell, a soldier was found guilty of murder —

> "and though Colonel Whaley that Commanded the Garrison, came into the Court and urged, that the Man was killed only for disobeying the Protectors Orders, and that the Souldier was but doing his Duty; yet the Judge regarded both his Reasons and Threatnings very little; and therefore he not only gave Sentence against him, but ordered the

> Execution to be so suddenly done, that it might not be possible to procure a Reprieve, which he believed would have been obtained, if there had been time enough granted for it."

This seems to us worth half a dozen early cases or text-books.

In the same way we think there is light to be thrown by history upon the suggestion of the Attorney General that the judges used to exercise the executive power to grant discretionary reprieves by delegation from the sovereign. There is authority to that effect, but is it not of the very worst sort?

The infamous Lord JEFFREYS said, in the trial of Lady Alice Lisle:

> "Look you, Mrs. Lisle, when I left His Majesty he was pleased to remit the time of all executions to me; that wherever I found any obstinacy or impenitence, I might order the executions with what speed I should think best; therefore, Mr. Sheriff, take notice you are to prepare for this execution of this gentlewoman this afternoon."
>
> 11 How. State Trials, 375.

This is the trial of which Parliament later declared that the verdict had been —

> "extorted and procured by the menaces and violences and other illegal practices of George, Lord Jeffreys."

The trouble with this sort of precedent is that it was wiped out in 1688. Of course, that is a common fact

of history which need scarcely be cited, but it is worth mentioning because of the conclusion which may fairly be drawn from the history of that time.

We submit that in the Declaration of Right of 1689, upon which the Bill of Rights was founded, the grievances of the community were listed. There is nothing there or in history to indicate that constitutional liberty required any limitation upon reprieves by judges. The power of the King to dispense was to fall. His power to pardon and reprieve remained. But no one thought there was any occasion to condemn a judge's power to hasten or postpone sentence, and the actors of that time probably knew the story about Hale.[1]

IV. Common Ground.

There is necessarily common ground between the executive and the judicial power. We say that such practice as that in Massachusetts is either exclusively judicial in its character or falls within this common ground. We submit, therefore, that any well-established practice of long standing for the exercise of power by judges is proper, independent of statute. We go further and assert that any reasonable exercise of the judicial power to determine when, and to what

[1] Until 14 Henry VI, c. 1, Justices of Assize could only receive the verdict. It was for the Court in Banc to give sentence.

Chitty, Cr. Law (2d ed.), vol. I, 696, 697.

At one time an ingenious device for getting highways repaired seems to have depended on a discretionary power to suspend sentence, for, after verdict of acquittal, and before judgment thereon, they used to try the issue again in another indictment.

Rex v. *Wandsworth*, 1 B. & Ald. 63.

extent, it will impose its judgment or sentence is proper, even in jurisdictions where it may be novel.

For the principle involved in dealing with the question of common ground, see —

Murray's Lessee v. *Hoboken Land &c. Co.*, 18 How. 272.

Hurtado v. *California*, 110 U.S. 516, at pages 528–530.

Roscoe Pound's "Justice According to Law," 13 Columbia Law Review, 696, and 14 Columbia Law Review, 1 and 103 (reprinted in pamphlet form).

V. Text-Book and Other Citations Not in Principal Briefs.

There are a few additional cases, and some text-books, which show how this power was exercised, instead of discussing its existence. We think they may be helpful, for common practice, as stated in books prepared for easy reference by the bench and bar, is quite as significant about this sort of thing as any reported cases.

See Chitty, Criminal Law (2d ed.), vol. I, p. 716 (1826).

Chitty contains the following chapters, which are instructive as to the extent of the judicial function:

Chapter 15, "Of the Proceedings between Verdict and Judgment."

Chapter 16, "Of the Judgment and its Incidents."

From these chapters various aspects of the power of suspending judgment appear, and in the second chapter

referred to there is a classification as follows, on page 701:

> "Judgments against defendant, are either by express sentence, or without any such sentence" —

and on page 716 various offenses are mentioned which—

> "May require the utmost severity which the Courts are empowered to exert, as their moral turpitude exceeds that of many capital offences; while there are others on the contrary for which the most trifling fine is an adequate penalty. In all these cases the practice of compelling the offender to find securities for his good behavior has prevailed and has been found of the highest benefit. It is indeed one of the most salutary instances in which our laws are directed to the prevention of crimes, which is at all times so much better than their punishment."

In *Rex* v. *Bishop*, 1 Strange, 9 (1717), defendant . . . appearing to be in a very ill state of health, PARKER, C.J., said:

> "The offence is so great that an adequate punishment may endanger his life, and to lessen the judgment would be an ill precedent; therefore bail him for the present and we will give judgment when he is better."

For "life" substitute "character," and you have the case for probation.[1]

See also Highmore on Bail (1791), 179–185.

[1] In *Burgess* v. *Boetefeur*, 7 Man. & Gr. 481 (1844), the plaintiff had informed against one Mitchell and others for keeping a bad house and

VI. Good Behavior.

All Courts exercising common-law jurisdiction have a common-law power to hold to security for good behavior. This power is secured to the Federal Courts by section 727 of the Revised Statutes, to be found in its re-enacted form in the New Federal Code, sec. 270. Upon the question of whether the practice in question is lawful or not, we deem the existence of this common-law power most material. And if the power to seek good behavior as an end by something other than a sentence of a fine or imprisonment is a common-law power in judges, substantially all constitutional difficulties disappear.

The common-law power is unquestioned. It is what the old manuals call the power to secure good behavior or "good abearing." For instance, Burns' Justice, which we purposely cite, in the Dover, New Hampshire, Abridgment by Eliphalet Ladd, of 1792 (pp. 400, 412), shows the existence of the power and its use at common law both in England and America. A reference is there found to the following passage in Dalton:

"I lately granted the good behavior against one

sued the Overseers of the Poor for the statutory amount due him for securing conviction. It appeared that indictments were prepared against Mitchell and others and they severally pleaded guilty in October, 1842.

"The judgment was respited that the nuisances might in the meantime be abated; and this having been done, the parties were afterwards (in June, 1843) brought up for judgment, when they were each fined 1*s.* and discharged." See page 484.

Meanwhile the overseers were changed, and the question was: Which overseers were liable for the money?

Held, by TINDAL, C.J., COLTMAN & CRESSWELL, JJ., that the conviction was not complete till judgment entered in June, 1843, so that the later overseers were held liable.

for that he had bought Ratsbane and mingled the same with Corn and then wilfully and maliciously did cast the same among his Neighbors Fowls, whereby most of them died . . . And since I have known it allowed as a good Cause by the Judges of Assise."

Dalton's Country Justice (edition of 1746), p. 288.

The same passage appears in the earlier edition of Dalton of 1690. These two folio editions were presented to the Social Law Library in Boston by Hon. Charles Jackson, an associate justice of the Supreme Court of Massachusetts from 1813 to 1823, and the edition of 1690 contains the book-plate of Francis Dana, chief justice of Massachusetts from 1791 to 1806.

The power is not limited to breaches of the peace. Two leading cases establish this. The first is —

Rex v. *Hart*, 30 How. State Trials, p. 1344.

In this case MANSFIELD, C.J., speaking for the judges of England, told the House of Lords that the power existed at the common law, and was not limited to breaches of the peace.[1] The crime under consideration there, however, was perhaps one tending to cause a breach of the peace. The doubt raised by that point is resolved by —

Regina v. *Dunn*, 10 Ad. & El. 1026, at 1041.

[1] As evidence that this power to hold to good behavior and future sentence was a perfectly common thing, we may say that we turned back by accident from the first page of the report of *Rex* v. *Hart* to the last page of the preceding report (*Rex* v. *Draper*, 30 How. State Trials, at 1129) and found the following:

"Lord ELLENBOROUGH: Col. Draper should enter into his own

In this case the celebrated Lord WENSLEYDALE, then Baron PARKE, held that the power existed at common law and was applicable to an indictment for perjury in making a false oath in bankruptcy proceedings against Angela Burdett-Coutts.

The following passage appears in the report of Charles Jackson, Asahel Stearns, and John Pickering, commissioners on the Revised Statutes of Massachusetts in 1835, part IV, tit. III, note to chapter 143, p. 84, in praise of this power:

> "When such sureties can be obtained it can hardly fail to operate as a powerful check upon the conduct of the party who is thus put upon his good behavior. And if his character and habits are such that no one will consent to be sponsor for him it must forcibly impress on his mind the value of a good character, while it deprives him of just complaint of the severity of the law or the magistrate."

The form of the recognizance in common use is interesting, since one who should merely turn over the textbooks might contend that the power was limited to cases where there was no previous conviction or to the

recognizance, with that of two other sureties, to come up, if called upon by the Court to receive judgment for that part of the libel which is contained in this indictment, and in the mean time to be of good behavior."

The judgment in this case reads:

"The defendant being present here in court, and being, by his own default, convicted of certain misdemeanors . . . he the said defendant gives security . . . for his personal appearance in this court whenever he shall be thereto required by this Court, in order to receive the sentence of this Court in this prosecution, and in the mean time to be of good behavior." Cf. *Queen* v. *Richardson*, 8 Dow. Pr. 511.

period after a sentence had been served. It exists before and after conviction. The common form recites conviction or plea.

In Davis's Criminal Justice (F. F. Heard's edition of 1853), an American book in wide and common use, the form for this recognizance is given at page 240. We condense it, without troubling the Court with marks of omission:

> "Whereas . . . is brought before said court on complaint charging him with . . . , and said . . . having plead that he was guilty
>
> "Now then if the said . . . shall be of good behavior toward all the people of said Commonwealth for the term of . . . months," etc.

Since, as was said in —

> *United States* v. *Midwest Oil Co.*, 236 U.S. 459, at 472 —
>
> "Government is a practical affair intended for practical men. Both officers, law makers, and citizens naturally adjust themselves to any long continued action . . . on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice" —

and since —

> "this principle is recognized in every jurisdiction" —

the idea that Courts have not the power to seek good behavior by proceedings other than sentences would seem to lack all historical foundation.

VII. Local Practice.

The case in the Massachusetts Superior Court referred to in the statement of facts above is *Commonwealth* v. *Macey*, a prosecution for statutory rape, tried to a jury in the Superior Court for Bristol County, Massachusetts. The defendant was convicted by the jury, and the Assistant District Attorney for the District moved for sentence, and insisted upon his motion. Counsel for the offender opposed this upon the ground that it would be unjust to sentence the defendant at all, having in mind the facts of the particular case. Mr. Justice BELL, of the Massachusetts Superior Court, denied the motion and ordered the case continued. No sentence has ever been imposed upon Macey.

(The correct view of this province of the District Attorney has recently been stated by this Court as follows:

> "The consent of the prosecuting attorney could not alter the case; he was not a dispensing power to give or withhold jurisdiction."
>
> Per HUGHES, J., *United States* v. *Mayer*, 235 U.S. 55, at 70.)

The brief of the late Hon. Charles R. Train, Attorney General for the Commonwealth, in *Com.* v. *Dowdican's Bail*, 115 Mass. 133, contained the following statement:

> "It has been a not uncommon practice in the Criminal Courts in this Commonwealth, after verdict, in minor offences, or where there were extenuating circumstances, or where questions of law upon similar questions were pending before this or some other court, to delay passing sentence, and

order the case to be laid on file. It has always been considered that the effect of such an order was simply to suspend passing of sentence, leaving it in the power of the court at any time, when the reasons which induced the delay no longer existed, to take the case from the files and have it proceed to judgment. The defendant in all cases where sentence was thus delayed on account of extenuating circumstances was put on his good behavior and under bonds, as it were, to live honestly."

Mr. Train was a man of large experience. The brief quoted is in the Social Law Library in Boston.

From *Com.* v. *Miller Snell*, reported in "Columbian Centinel," published in Boston, January 14, 1832, it appears that, when passing sentence on a boy for attempt to kill by poisoning, THACHER, J., said:

"The object of all punishment, by a human tribunal, is twofold — to act upon the offender and to bring him, if possible, to a better mind; and to deter others by his sufferings from committing a like offence. . . .

"I wish that I could impute it to accident, to want of discretion, to anything rather than to malice; but not only the verdict of the jury, but the circumstances of the case, convince me that the defendant perpetrated this deed with such deliberate malice as that he is a suitable object of punishment.

"*I have striven to find such circumstances of mitigation as would authorize me to suspend the sentence*, and to consent to send the defendant to

the House of Reformation for Juvenile Offenders. But that house was not prepared for such an offender as this. . . . [It was a private charity.]

"If he should be sent to that place it would not, I fear, be regarded by the community, and especially by the young, as a punishment. To send him home to his friends, without punishment, would be a great reflection on the justice of the law."

VIII. Local Precedents.

There are local precedents which have weight in themselves besides proving local practice.

Commonwealth v. *Chase*, Thacher's Criminal Cases, p. 267:

This case was also differently reported in 1 Law Reporter, 163 (1839), Peleg W. Chandler, editor — with a note that "the principles of the above decision have often been recognized in Boston."

The case is a Massachusetts precedent of considerable importance which has escaped the notice of counsel in the principal briefs. It decides that the power to suspend sentence exists at the common law. The importance of the case is increased by a footnote (at page 270) which records that a petition for certiorari was brought to reverse Judge THACHER'S decision; that upon a hearing of this appeal Chief Justice LEMUEL SHAW delivered an opinion sustaining Judge THACHER, in which the other judges of the court were understood to concur. These other judges were SAMUEL PUTNAM, SAMUEL S. WILDE, and MARCUS MORTON.

We have made diligent search for any written opinion or report without any success.

We believe from papers we have found that Mr. Justice STORY received, on its publication in 1839, and read, the number of the Law Reporter containing the report of this case. He was then associate justice of this Court for the First Circuit.

The case arose in the old Municipal Court of Boston, in which Judge PETER OXENBRIDGE THACHER sat for twenty years, from 1823 to 1843. He was one of the most respected *nisi prius* judges in the early part of the nineteenth century, and, as stated in the preface to the volume of Criminal Cases, "was distinguished for his earnest study and thorough knowledge of the criminal law and its practical application."

This case is recorded in volume XIX of the Records of the old Municipal Court of Boston, at page 199. The offense was stealing from a dwelling. The material part of the record is:

> "And now at the May term, A.D. eighteen hundred and thirty-one Jerusha Chase is brought up for sentence under an indictment found against her at the January term A.D. eighteen hundred and thirty of this Court: Said Jerusha having recognized, at the February term A.D. eighteen hundred and thirty to come when sent for and in the meantime to keep the peace. And said indictment is continued until the present July term. And now the Court having seen and considered the petition of said Jerusha setting forth that there is no law, usage, custom, practice, or right known to the laws of the land or in use and force in the administration of Justice, whereby this Court at this term and under the premises and circumstances of this Case, are authorized to pass any additional or other

sentence upon said Jerusha and praying to be discharged from said indictment, do order, that she take nothing by said petition, and now the Court having considered of her offence as set forth in the indictment, do order that she suffer five days solitary imprisonment and afterwards to be confined to hard labour six months."

The petition for certiorari is noted in the docket of the Supreme Judicial Court for Suffolk County at the November term, 1831, where it appears, on page 101, that S. D. Parker was for the petitioner, and the Solicitor General for the Commonwealth. The entry "Petn dismissed" is perhaps in the handwriting of Chief Justice SHAW.

The original indictment against Jerusha Chase was found at the January term, 1830, and is endorsed:

> "Feb. 8. Defendant retracts her plea and pleads guilty and recognized in the sum of two hundred dollars with Benjamin Salmon, trader, and Daniel Chase, Cordwainer of Marblehead, to come when sent for and in the meantime to keep the peace," etc.

In 1874, forty-four years after the opinion in the Chase case, the question arose again in —

Commonwealth v. *Dowdican's Bail*, 115 Mass. 133.

Compare —

Commonwealth v. *Maloney*, 145 Mass. 205, at 211.

Marks v. *Wentworth*, 199 Mass. 44, 45.

The Attorney General's brief (p. 39) dismisses the case of *Commonwealth* v. *Dowdican's Bail* with this brief comment:

> "in which it is said expressly that the practice 'has been recognized by statute'."

If the two statutes, referred to by Chief Justice GRAY, had been examined, however, it would have appeared that these statutes in no way purported to create the power as to cases in general, but simply regulated the exercise of general power in specific cases, viz., liquor prosecutions. For the convenience of the Court, the first of these statutes is copied here, as follows:

St. 1865, c. 223:

> "SECTION 1. No case in court for the violation of the provisions of the eighty-sixth chapter, or of sections six, seven, eight or nine, of the eighty-seventh chapter of the General Statutes, shall be laid on file or disposed of except by trial, judgment, acquittal or sentence, as the case may be, according to the regular course of proceedings in criminal cases, unless in any case the purposes of justice require other disposition thereof, to be shown upon a written motion setting forth specifically the reasons therefor, and verified by affidavit where facts are relied on; and in such case the motion shall be allowed only upon the certificate of the presiding magistrate or judge, that he is satisfied that the cause relied on exists, and that the interests of public justice require the allowance thereof, which certificate shall be filed in the case.
>
> "SECTION 2. It shall be the duty of the judges,

by a frequent examination of the dockets of their several courts, to see that the provisions of this act are strictly complied with.

"SECTION 3. Nothing in this act shall be construed to affect in any way the course of proceedings where exceptions are pending."

The other reference of the chief justice is to the same statute, reappearing in the revision of the liquor laws. See section 60, c. 415, of 1869.

Certainly the reference to these statutes cannot be used to support the argument that the power depended upon specific statutory provision.

It may therefore be considered as reasonably established in the common law of Massachusetts that the power to suspend judgment existed. And the decisions of Chief Justice SHAW and Chief Justice GRAY must go far toward convincing any Court that it exists throughout the common-law jurisdictions of this country.

IX. Consequences of a Decision against the Practice.

(A) A decision that it is unconstitutional will prevent parole and probation laws.

(B) A decision that it must be authorized by statute may or may not bring such a statute.

If it does not, it will stop parole and probation.

If it does, it will be a point decided merely to be changed by statute.

(C) A decision that it has been unlawful will bring on what we may fairly call a day of judgment. All over the United States men living honestly — law-abiding, reformed citizens — will be brought into court for

sentence. In Massachusetts, for instance, we estimate that perhaps two hundred men and boys now out on good behavior will be haled into court.

X.

Conclusion.

To a certain extent we have followed the learned Attorney General in citing old cases and ancient precedents. But we have tried not to forget, and we venture to remind the Department of Justice that some of these decisions were made when thousands were being hanged for trifling thefts and offenses. In most of the cases where offenders were intelligent enough to create sympathy the law of benefit of clergy then gave it with a too willing hand. However important it may be that such precedents should be consulted, and however valuable they may prove as blazes upon the trail which leads to modern American justice, in the end our criminal law should grow, and grow healthily, into a modern and effectual power for better things. It will not do, when we deal with the human soul lodged in an erring body which has stolen 50 cents' worth of interstate brass, to say that such precedents establish that a further parole statute will be necessary, and meanwhile Courts must conform to a Procrustes standard of statute law untempered by Anglo-Saxon customs.

Extreme cases of the abuse of judicial power can of course be put. They may be as extreme as recent notorious abuse of the pardoning power, but, so long as judges are trusted with the tremendous power of imposing sentences, the mere putting of extreme examples should not be suffered to destroy reasonable and helpful use of it.

Probation before sentence has become a part of our institutions. It is a necessary and a worthy part. In the

administration of justice it helps to reform, it helps to deter, and it helps to educate those against whom criminal process is directed. As a modern and valuable idea it has arisen out of practice and customs, not out of statutes or pieces of paper. It is serving the community well to-day. And the only logical reason given for tearing down the structure so far built up, to begin anew with a statute, is the theory that the letter of the law might secure a greater uniformity throughout the country. But surely that is the letter which killeth.[1]

Respectfully submitted,

RICHARD W. HALE,
FRANK W. GRINNELL.

16 Central street,
Boston, Mass.

[1] We add the following American citations upon the common-law power of Courts of record to hold to good behavior:

In *Com.* v. *Duane*, 1 Binney, 98, note, TILGHMAN, C.J., said:

"Surety for good behavior may be considered in two points of view. It is either required after conviction of some indictable offense, in which case it forms part of the judgment of the Court and is founded on a power incident to courts of record by the common law, or it is demanded by judges or justices of the peace out of court, before the trial . . . in pursuance of authority derived from a Statute made in the 34th year of Edward 3."

The report of this case in —

1 Hall's American Law Journal and Miscellaneous Repertory, 168 —

must have given it wide currency. Hall's was the first American law journal and this the second number.

In *Estes* v. *State*, 2 Humphreys (Tenn.), 496, 498, it is said:

"Binding to the good behavior was a discretionary judgment, at the common law, after a conviction for a gross misdemeanor, before the passage of the statute of 34 Edward 3" —

and it is held that that is the law of Tennessee.

In *United States* v. *Greener*, 4 Phila. 396, 403, security for good behavior was required before trial in a case of treason.

No. 12 Orig.

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In the Supreme Court of the United States

October Term, 1915

EX PARTE: IN THE MATTER OF THE UNITED STATES, PETITIONER
No. 12 ORIGINAL

Memorandum Submitted by the New York State Probation Commission as Amicus Curiae

In the
Supreme Court of the United States

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EX PARTE: IN THE MATTER OF THE UNITED STATES, PETITIONER

MEMORANDUM

The State Probation Commission respectfully begs to present this memorandum concerning the development and use of the suspended sentence and the probation system in the various states as having an important bearing upon the case before the court.

This case relates to the inherent power of the judges of the United States Courts to suspend the imposition or the execution of sentence indefinitely in criminal cases in which conviction has been obtained but in which, in the opinion of the court, there exist circumstances in mitigation of the offense and in which such suspension of sentence appears compatible with the public interest and the best interests of the defendant.

The power to suspend sentence has become well established in the criminal courts of England and of the various states and has been exercised from very early times. This has been recognized in practice and by a number of court decisions.

In the case of People ex rel. Forsythe v. Court of Sessions, 141 N. Y. 288, unanimously concurred in by the Court of Appeals in New York in 1904, Judge O'Brien said:

> "There can I think be no doubt that the power to suspend sentence after conviction was inherent in all such courts (superior courts of criminal jurisdiction in England) at common law. The practice had its origin in the hardships resulting from peculiar rules of criminal procedure, when the court had no power to grant a new trial, either upon the same or additional evidence, and the verdict was not reviewable upon the facts by any higher court. The power as thus exercised is described in this language by Lord Hale: 'Sometimes the judge reprieves before judgment, as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment is insufficient, or doubtful whether within clergy. Also when favorable or extenuating circumstances appear and when youths are convicted of their first offense. And these arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their sessions be adjourned or finished, and this by reason of common usage.' (2 Hale P. C. ch. 58, p. 412.) This power belonged of common right to every tribunal invested with authority to award execution in a criminal case. (1 Chitty Cr. L. 1st ed. 617, 758.)
>
> "Without attempting to collate all the authorities on the subject, it is sufficient to say that the power to suspend sentence at common law is asserted by writers of acknowledged authority on criminal jurisprudence, by the uniform practice of the courts and numerous adjudged cases. (2 Hawk. P. C. ch. 51, Sec. 8; 1 Bishop's Cr. Pro.

Sec. 1124; 4 Bl. Com. ch. 31; People v. Graves, 31 Hun, 382; People v. Harrington, 15 Abb. N. C. 161; People v. Whipple, 9 Cow. 715; Carnal v. People, 1 Park. Crim. Repts. 262, 266; Commonwealth v. Dowdican, 115 Mass. 133; State v. Addy, 43 N. J. L. 114; Weaver v. People, 33 Mich. 297; People v. Reiley, 53 id. 260; Commonwealth v. Maloney, 145 Mass. 205; Sylvester v. State, 65 N. H. 193.) * * * It is a power which the court should possess in furtherance of justice to be used wisely and discreetly, and it is perhaps creditable to the administration of justice in such cases that while the power has always existed no complaint has been heard of its abuse."

The decision above quoted assisted in establishing the constitutionality of the suspended sentence in New York State. There have been similar decisions in other States, some of which are cited in the above. In the State of Massachusetts the practice of placing cases "on file" which is identical with the suspension of sentence as used in other States has been prevalent for a great many years. In the case of Marks v. Wentworth, 199 Mass. 44 (1908), it is stated:

"It has long been the practice in this Commonwealth for a court, with the consent of the defendant, after a verdict or plea of guilty in a criminal case, when for good cause it seems best not to impose sentence immediately, to place the case on file. This practice has been recognized by statute and approved by this court. The effect of it is fully stated in Commonwealth v. Dowdican's Bail, 115 Mass. 133. See also Commonwealth v. Foster, 122 Mass. 317, 323; Commonwealth v. Maloney, 145 Mass. 205. The case then stands on the records of the court, and although usually no

further proceedings are had in it, it may at any time be called up and sentence may be imposed, or some other final disposition may be made of it."

The Probation System and Suspended Sentence

A consideration of the utmost importance is the intimate relation between the power to suspend sentence and the use of the probation system. Probation is a method by which a court disciplines and seeks to improve certain offenders without subjecting them to imprisonment. The defendants after conviction, and after investigation by the probation officer in most cases, are released under suspension of sentence upon good behavior and are placed under the authoritative oversight of a representative of the court known as the probation officer. The offenders must obey certain rules and for failure to do so they may be returned to court for the execution of sentence. The probation officer keeps informed regarding their conduct, encourages and aids them to behave properly and reports to the court frequently concerning their progress and condition. The system is applied principally to first offenders and others who because of youth or previous good record, or because of other mitigating circumstances do not appear to be in need of prison discipline and who show promise of reform under probation.

It is clear that probation is dependent upon the power to suspend sentence and is superimposed thereon. By placing the offender under supervision and discipline, probation effectively supplements and safeguards the use of the suspended sentence.

Advantages of Probation

The advantages of the use of probation in proper cases are many and generally recognized. Probation officers endeavor to establish friendly relations with the persons under their care and do whatever is most

needed to strengthen their character and better their surroundings. They secure employment for them, and, if necessary, charitable aid, medical attention and other similar services. They obtain the assistance of the relatives, friends and employers of probationers and the co-operation of churches and various philanthropic and social organizations; they encourage probationers to start bank accounts, to associate with more desirable companions, and to overcome bad habits. Through probation families are re-united and wives and children supported. Money for family support, fines imposed by the courts, and restitution for injury or loss occasioned by the crime is collected by probation officers in instalments, thus avoiding imprisonment and establishing habits of industry and thrift. In the words of the Hon. Charles A. DeCourcy, Judge of the Superior Court of Massachusetts:

> "Probation guards the young offender from the contamination and stigma incident to prisons, however well conducted. It disciplines him in a 'reformatory without walls,' without depriving his family of support and at a large saving to the State. From an experience of more than seven years I have found that the results were good in fully three-quarters of the cases when entrusted to officers who possess sound judgment and tact, humane instincts and devotion to their work."

The actual results obtained by probation in certain states will be referred to later on.

History of Probation

Probation grew out of the practice of securing some one, perhaps a court official or a volunteer social worker, to supervise offenders released under suspended sentence in order to help and improve them. The system sprang

up naturally in widely separated localities. It obtained statutory recognition first in Massachusetts in 1878 (ch. 198). In 1891 (ch. 356), probation was made a feature of the judicial system of Massachusetts by requiring the justices of all municipal, police and district courts to appoint probation officers. In 1898 the system was extended to the Superior Court. Massachusetts was followed by Illinois, Minnesota and Rhode Island in 1899; by New Jersey and Vermont in 1900 and by New York, Missouri, Kansas, Wisconsin and the District of Columbia in 1901.

In the State of New York the establishment of the probation system grew out of statutes confirming and defining the power to suspend sentence. The act of 1901 (ch. 372), provided for the appointment of probation officers in the criminal courts of the State and defined their procedure.

Juvenile probation is now established by statute in 43 states, Alaska and the District of Columbia; only 5 states are now without any probation laws. Both adult and juvenile probation are established by statute in 25 states and the District of Columbia.

Few if any reforms have had the widespread recognition and rapid development that the probation system has obtained. No statistics are available for the country as a whole, but complete statistics from certain states, especially those which have established State Probation Commissions (New York, Massachusetts and Vermont) are available.

Probation in New York State

Over 18,000 persons are annually released on probation by the courts in the State. (The total number placed on probation for the year ending September 30, 1915, was 18,572, divided as follows: Boys under 16, 5,081; girls under 16, 613; men, 11,176; women,

1,702.) During the past year there was an average of 11,153 persons on probation *at all times*. This number has shown a remarkable increase, there being but 1,672 persons under probationary care at the end of 1907, the first year complete statistics were obtained by the State Probation Commission.

In the higher courts persons are placed on probation for serious felonies and are under discipline and care for periods of from 1 to 5 years. They are required to report regularly; their homes are visited; they are kept employed and usually co-operate with the probation officer in his plans for their re-establishment as good citizens.

In all cases placed on probation the State Commission obtains a report as to the results obtained. In 1914, 78 per cent. of all cases whose probation terminated during the year were reported discharged improved; only 12 per cent. were rearrested and committed. These percentages have varied little during the past eight years.

In New York State probation officers personally collected and paid to the families of probationers $106,908 during the past year. They collected $17,899 in instalments for fines and $24,096 in instalments for restitution to injured parties.

There are at present 182 salaried probation officers serving in the State, and in addition approximately 300 part time volunteer officers.

Probation in Massachusetts

The state where probation originated has naturally developed and used the system most extensively. During the year ending September 30, 1914, 24,714 persons were placed on probation. During that year 13.5 per cent. of all criminal cases begun in the courts

were placed on probation. A total of $189,830 was collected from probationers in nonsupport cases and $56,745 in instalments for fines.

Every criminal court in Massachusetts has one or more probation officers, 129 salaried officers being so employed at the present time.

The use of the system in Massachusetts has been extended sanely and steadily and its results have been very satisfactory.

Probation in Connecticut

During the year ending September 30, 1914, 4,096 persons were placed on probation, 1,440 juveniles and 2,656 adults. A total of 6,306 cases were under care during the year. Of the cases released during the year, 3,162 observed the terms of their probation, while 464 were rearrested and committed. There are at present serving in the courts of Connecticut, 67 probation officers.

Probation in Other States

In the states of New Jersey, Illinois, California, Colorado, Indiana, Minnesota, Ohio, Pennsylvania, in the District of Columbia and in other states, probation is used extensively and successful results are reported. There is every evidence that the system has approved itself to the courts and to the people wherever it has been established. Its further extension into all parts of the country is to be expected.

Probation in Other Countries

Probation has been extensively adopted in Great Britain, Canada, New Zealand, Australia and other countries; legislation provided for the suspension of sentence and other features of the probation system is

found in France, Germany, Holland, Switzerland, Belgium and other European countries. The American system of probation has been studied and approved by penologists from all parts of the world.

Conclusion

In the United States District Courts there were 12,079 convictions during the year ending June 30, 1914. (See Report of the Attorney-General.) Five thousand nine hundred and seventy-six of these plead guilty. Many of the defendants are boys and young men and first offenders. Frequently they are taught a serious lesson by their apprehension and conviction; often they are ready and willing to co-operate with the court and the probation officer if they are given "another chance." In certain cases there are circumstances connected with the offense which make it evident that the offender, while technically and legally guilty, is not morally culpable to as great a degree as the charge and the penalty would seem to indicate. For many of these cases commitment to a prison is neither wise nor effective. It may neither serve as a protection to society in the long run nor be of any benefit to the guilty party.

In such cases the Federal judges have in many districts applied the suspended sentence and utilized such probation officers as were available. In all of the four districts of New York State the judges of the Federal Courts have in certain cases suspended sentence on young offenders and in a number of instances have requested some proper person, frequently one of the probation officers under the supervision of the State Probation Commission, to act as probation officer, thereby employing the same system as is now carried out in the New York State courts.

We are confident that the principle and method of the suspended sentence and probation is as applicable and advantageous when applied in a Federal court as it is when applied in a State court. We believe that the results will be as satisfactory, and indeed have been in many instances already.

These facts and considerations are respectfully submitted to your Honorable Body in the hope that they will assist you in arriving at a right decision in this important matter.

THE N. Y. STATE PROBATION COMMISSION,

HOMER FOLKS, *President,*

CHARLES L. CHUTE, *Secretary.*

FILED
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IN THE

Supreme Court of the United States

October Term, 1915.

No. 11 Original.

EX PARTE THE UNITED STATES, PETITIONER.

Answer of John M. Killits, Judge of the District Court of the United States, for the Northern District of Ohio, to the Rule of This Court Upon Him to Show Cause Why a Peremptory Writ of Mandamus Should Not Issue, Commanding Him to Vacate and Set Aside the Certain Order Entered in Said District Court on March 15, 1915, Suspending the Execution of the Judgment of Imprisonment Against James J. Henahan.

IN THE

Supreme Court of the United States

October Term, 1915.
No. 12. Original.

EX PARTE THE UNITED STATES, PETITIONER.

Answer of John M. Killits, Judge of the District Court of the United States, for the Northern District of Ohio, to the Rule of This Court Upon Him to Show Cause Why a Peremptory Writ of Mandamus Should Not Issue, Commanding Him to Vacate and Set Aside the Certain Order Entered in Said District Court on March 15, 1915, Suspending the Execution of the Judgment of Imprisonment Against James J. Henahan.

The respondent, under said rule to show cause, says that a peremptory writ of mandamus should not issue for the following reasons:

FIRST. The District Court of the United States, of which respondent is a judge, has the power to suspend the execution of a sentence or judgment in a criminal case for either a definite or indefinite period, as circumstances require.

The power may be exercised either by suspending the imposition of sentence or by suspending the execution of sen-

The power is not limited, as claimed by the Attorney General, to definite suspensions for particular purposes, such as to give the court an opportunity to determine the proper sentence to be imposed, or to allow an appeal to be perfected, or to allow time to prosecute a defendant on other charges, or to allow a definite time for application for pardon.

It is not claimed by respondent that the power to suspend sentence indefinitely may be exercised capriciously or arbitrarily but that its exercise should be consonant with the best interests of society, in cases where either the arbitrary minimum penalty is disproportionate to the actual criminality involved in the particular offense or when, by reason of circumstances peculiar to the instant case vindication of the law may be associated with the saving of the individual as a responsible unit of society.

It is not claimed that the power may be exercised in any case against the objection of a defendant, or as a means of imposing an indefinite and uncertain punishment.

It is further claimed that the court has the power to vacate such an order of suspension and either impose sentence or order execution of sentence within a reasonable time, when the facts and circumstances show that such course would be consistent with the original suspension and that so to do would not be unjust to the convict.

It is denied that the court loses jurisdiction of the defendant by allowing him to go subject to suspended sentence in either form.

Respondent respectfully advises the court of his opinion sustained by actual experience in the administration of the criminal law, that convictions are obtained in many cases wherein otherwise disagreements or acquittals would seem to

be probable, because the juries understand that the court will recognize the circumstances peculiar to the respective cases, and, in dealing with the sentence, give attention to them, and it is respectfully suggested that the law is more dignified by convictions for unmistakable infractions, followed by an action by the court calculated to give effect to the circumstances creating sympathy for the convict by directing them to his reclamation than by suffering sympathetic verdicts of acquittal, or, which is undoubtedly a case of frequent occurrence, by reluctance on the part of prosecuting officers to bring to indictment and trial a case having sympathetic features.

Respondent rejects utterly the theory, in law or religion, that the law, human or divine, requires vindication by definite and prescribed punishment of offenders, and submits that punishment should be imposed only for the good and protection of society and claims the power in question in this proceeding should be exercised in cases in which the good, welfare or protection of society requires.

SECOND. It is respectfully suggested that the power to suspend either the imposition or the execution of sentence after conviction is not an equivalent of the pardoning power vested in the Executive, for the reason that the convict is not thereby relieved from the disabilities which a pardon removes, but remains still a convict until a pardon is granted.

In this connection respondent respectfully shows that many states, of which New York, Michigan, Illinois, Massachusetts and Ohio are cited as examples, have empowered courts to suspend the execution of sentences upon conviction and that legislation in this behalf is generally held by the State Courts as not unconstitutional as an invasion of the pardoning power vested in the Executive.

In this connection Respondent further advises the court that a practice universally exists, in a case where one stands

convicted of two or more distinct offenses, whether under two or more counts of one indictment or under separate indictments, to impose upon the convict, in the discretion of the court, concurrent sentences, although so to do may be argued to be equivalent to absolving the convict from merited punishment for all save one of his crimes. This practice has never been questioned as an apparent usurpation of executive function.

Respondent is unable to see any substantial distinction between the discretion conceded to abide in a court in such a case, and that which Respondent claims for his court and now under examination.

THIRD. Respondent respectfully shows the court that the power to suspend sentence in one form or another, has been exercised by judges of the District Court of the United States for time out of mind, and asks this court to take judicial notice of the continuous exercise of that power.

The records of the District Court of the United States, for the Districts in Ohio, show the exercise of the power to suspend execution of sentences since 1867 by Judges Sherman, Swing, Matthews, Baxter, Sage, Ricks, Wanty, McCall, Wing, Tayler, Thompson, Day, Clark, Sater, Hollister and the respondent.

Respondent has been unable to have a search made of the records of said courts prior to 1850, and cannot inform the court of instances of the exercise of the power prior to that time.

In Respondent's own district, at least since July 1, 1910, and until about January 31, 1915, when the Attorney General of the United States issued instructions to all District Attorneys to object to the practice, all suspensions of sentences were with the consent of the District Attorney, and in a majority of cases, they were upon his recommendation.

Respondent shows the court that in the District Court of the United States, for the Eastern District of Michigan, the power to suspend the imposition of sentences has been exercised since 1860 by Judges Wilkins, Longyear, Brown, Swan, Sessions, Angell and Tuttle, and in the Western District of Michigan has been exercised by Judges Wanty, Sessions and Severens.

Respondent has made inquiries of judges now sitting in various jurisdictions and from information so obtained shows that the power is now, and has been, exercised in many states.

In the Alabama districts the power has been exercised for many years by Judges Grubb and Clayton and their predecessors, Judges Bruce and Jones.

In Florida Judges Locke, Settle, Swayne, Call and Sheppard have suspended sentences in both ways since about 1870.

In Georgia Judges Speer and Newman suspend sentences and follow in this respect the practice of their predecessors, Judges McKay and Erskine.

In Illinois Judges Carpenter, Landis and Humphrey exercise the power.

In Kentucky Judges Evans, Cochran and Barr have suspended sentences.

In Massachusetts, the Federal Courts, following the established practice in the State Courts, have for many years continued cases after a plea or verdict of guilty and have subsequently placed such cases on file without sentence; this practice has been availed of, with the consent of the United States Attorney for that District, for probationary oversight of defendants during such continuances.

The case of *U. S. vs. Margaret Mulhall*, who was indicted for complicity in smuggling and who pled guilty in April, 1913, was, on 2 July, 1914, placed on file without any sentence. It was at that time represented to the court by the United States Attorney that the Attorney General of the United States requested such action.

In Missouri Judges Van Valkenburgh and Dyer and their predecessors, Philips, McPherson (sitting by designation), Thayer, Adams, Priest and Finkelberg, have exercised the power.

In Nebraska, New Jersey and New Mexico the custom prevails.

The State judges in New York appear to have exercised this power since 1816, as appears from the reports of *People vs. Reed* and other cases in 1 City Hall Recorder, at pages 4, 6, 21, 28 and 41, and by various other reported decisions.

On the record of the United States District Court, for the Western District of New York, it appears that on November 23, 1869, Judge Hall, then District Judge, suspended several sentences, and in the District Court, for the Southern District of New York, sentence was suspended in the case of *United States vs. Peter Anderson*, on January 7, 1858.

Respondent is authorized to advise this court that all of the United States District Judges now sitting in New York exercise the power of suspending imposition of sentences and believe it is essential to the proper administration of justice and understand that they are following the practice observed time out of mind by their predecessors, Wallace, Coxe, Lacombe and all District Judges in the Second Circuit.

In North Carolina, Judges Boyd and Connor report that the practice has been followed since 1872.

In North Dakota, Judge Amidon exercises the power.

In Pennsylvania, Judge Thomas Irwin exercised this power by entering an order in arrest of judgment at the October, 1854, term. Judge McCandless exercised the power in many cases, beginning in the May, 1863, term. Many orders of suspension were entered by Judge Ketcham between 1870 and 1880.

The judges now sitting in Pennsylvania, and their predecessors, Irwin, McCandless, Ketcham, Acheson, Reed, Buffington, Ewing and Young, have exercised this power.

In Tennessee, the practice has been common since 1873, and has been followed by Judges Emmons, Trigg, Baxter, Key, Clark, Jackson, Lurton, McCall and Sanford.

Sentences were suspended very frequently by Judge Baxter, particularly in revenue cases.

In Virginia, Judges McDowell and Waddill exercise this power and believe it has been continuously used by their predecessors, Judges Rives and Paul, for over fifty years.

In 1879, Judge Rives entered such an order in the case of *United States vs. Peter C. Coffee.*

In 1808 and 1809, Chief Justice Marshall then sitting at a court of the United States, for the Fifth Circuit, and Virginia Districts, suspended temporarily, for no reason appearing of record, the execution of a part (flogging) of two sentences.

In West Virginia, the power has been exercised since 1865 by Judges Jackson and Keller.

In Wisconsin, the power has been exercised by Judges Sanborn, Hopkins, Dyer and Bunn.

It appears that justices of this court while acting as circuit or district judges, have freely exercised the power of suspending sentences in criminal cases.

Mr. Justice Brown, while a district judge in the Eastern District of Michigan, entered orders suspending sentences in four hundred and fifty-six cases between 1875 and 1889.

Mr. Justice Matthews, while sitting in the Southern District of Ohio, suspended a sentence against one Martin Scholl, in 1881.

Justices Lurton and Jackson exercised this power while sitting as Circuit Judges in Tennessee.

In 1869, Mr. Justice Blatchford, in the District Court, for the Southern District of New York, exercised this power, as appears from the reported case of *United States vs. Blaisdell*, 3 Benedict, 132.

Respondent offers to make such proof as this court may require to show the continuous exercise of said power in one form or another by these and other District Courts of the United States.

The claim is now made by respondent that by such continuous exercise of this power, the usage or custom of the courts has become and is the law of the United States, and the District Courts of the United States have the power to suspend either the imposition or execution of sentence when otherwise injustice would be done.

FOURTH. Respondent shows the court that the exercise of the power now in question has been acquiesced in by the Department of Justice and the Presidents for nearly a century, and the records of the courts show instances in which the Department of Justice requested the courts to exercise the power.

The claim is now made that by such continuous exercise of the power by the courts, and by the acquiescence of the Presidents and the Department of Justice, it has been determined that the exercise of the power is not an invasion of the President's power to grant reprieves and pardons.

FIFTH. It is claimed by respondent that the common law and practices of the Federal Courts with respect to the matter now in controversy, were known to Congress and that all statutes relating to the punishment of crimes and offenses and all statutes relating to Federal Courts were enacted with reference thereto, and that by construction, in the absence of statutory language clearly inconsistent with the further observance of the common law and such practice, the common law became a part of such statutes and the law until Congress shall have unequivocally enacted otherwise.

SIXTH. If this court shall be of the opinion that the District Courts of the United States do not have the power to suspend sentences in the circumstances and to the extent herein claimed, then, it is respectfully submitted that they have the power to suspend imposition of sentence or execution of sentence as auxiliary to and in aid of the President's power to grant reprieves and pardons, and that such suspensions may be made until such time as the President refuses to pardon.

Respondent shows that it is practically impossible for the President to read and consider all applications for pardon and to act on them in time to prevent the imposition of penalties in cases in which pardons should be granted and no penalty should be suffered, and, to prevent injustice, and to enable the President to exercise his power, it is necessary that the penalties of the law be suspended until the President has acted. It will not suffice to grant a suspension of sentence for a definite time, for the President may not be able to act within the time

fixed, and the only means by which the proper result can be accomplished is by a suspension until the President has acted, that is, until he has refused a pardon.

Respondent is unable to furnish this court the data showing the great increase in the number of criminal cases in the Federal Courts, but is informed there has been a very large increase due to the increase of population and to new criminal laws enacted by Congress.

It is necessary that the information bearing upon applications for pardons be collected in advance of the presentation of such applications to the President and in most cases the collection of such information requires a considerable length of time.

Respondent directs the attention of this court to the fact that in all cases a trial court has its informaton first-hand, in the community in which the convict resides or the crime was committed, while the President must necessarily be informed by reports of investigators, pardon clerks, district attorneys, the trial courts and others.

Respondent shows that if the power, as hereinbefore claimed and as exercised by the courts, does not exist, or if it is held that suspensions may not be allowed until after the President has acted, the President will be burdened with applications that he cannot possibly consider and it will be necessary to provide some relief.

If it shall be held that the exercise of this power is an invasion of the President's power to grant reprieves and pardons, it will then be impossible, by legislation, to give relief to the President without making such legislation unconstitutional as an invasion of the President's power, unless such legislation shall be a general revision of the criminal code

eliminating all minimum penalties and permitting courts to fix an appropriate penalty not exceeding a prescribed maximum. Respondent is informed that the reason the courts of Great Britain no longer exercise this power is that their criminal law does not prescribe any minimum penalties.

Respondent further shows that the President and the Department of Justice have acquiesced in the exercise of this power by the courts and have provided that applications for pardons shall not be considered in cases in which the exercise of this power is effective to prevent the imposition of penalties, that is to say, it has been provided in the forms of applications for pardon and in the instructions relating thereto, that except in the most unusual cases applications will not be considered unless the applicant is in prison.

Respondent therefore claims that in any event he had the power to suspend the execution of the sentence against James J. Henahan until after the President had refused to pardon and that the order of suspension in the case under review should at least be considered and held to be a suspension for that time and purpose.

SEVENTH. Respondent further shows that it is necessary to the proper administration of justice that the courts should have and exercise the power to suspend sentences for the reason that the President has delegated to the Department of Justice the reading and consideration of applications for pardons.

It seems obvious to the respondent that the Government officers whose department has had charge of a criminal prosecution, may honestly have difficulty in balancing and considering the facts and circumstances bearing upon applications for pardons, and may oppose executive clemency in cases on which

judges would look with favor because of their ability to see all sides of a situation and to consider and weigh the facts bearing upon the application.

Every citizen of the United States has the right to petition the President for a pardon and has the right to a full, fair and impartial consideration of his case.

Respondent does not claim that there has been any abuse of the power thus delegated and does not suggest that there will be, but submits this statement to show that the rules and practice with respect to applications for pardons do not adequately provide for the cases in which judges have exercised the power to suspend sentences.

Respondent respectfully refers to the rules for applications for pardon and to the form of application issued by the Department of Justice, as showing that injustice may be done in many cases if the power now in question is denied.

Respondent further shows it is necessary that the courts exercise the power in question for the further reason that there is no Federal probation system. Throughout the United States; in response to the demands of the people probation systems have been provided by legislation with the view of saving offenders for useful lives and in the states in which the power now in question is denied, the courts or boards or commissions accomplish practically the same result under the provisions of the probation acts.

In Ohio, for illustration, the courts are at liberty to choose between the exercise of the common-law power to suspend execution of sentences and the use of the probation legislation, as it is found in some cases that injustice will result unless the common-law power is used.

EIGHTH. Respondent respectfully shows that the order for the suspension of the sentence against James J. Henahan, herein complained of, was not arbitrarily or capriciously granted, but was made upon the application of James J. Henahan and for the following, among other reasons:

The indictment against Henahan was for embezzlement from a national bank and for making false entries on its books, contrary to Section 5209 of the Revised Statutes of the United States, which provides that one so doing shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five nor more than ten years.

There were four counts in the indictment, alleging at least two separate offenses, so that the defendant, Henahan, was then subject to be imprisoned not less than ten years unless the court had the right, by making sentences run concurrently, to remit part of the penalty.

It was also made to appear that Henahan was a young man about thirty-one (31) years of age, and had been employed as a teller in The Second National Bank of Toledo, and that by manipulating the mutilated currency of the Bank had embezzled about Forty-five Hundred Dollars ($4,500.00); and had made false entries to conceal such transactions and had otherwise violated Section 5209 of the Revised Statutes of the United States.

As it appears in the indictments which are exhibited with the petition herein, the acts for which Henahan was indicted, occurred in June and July, 1914, and he was not indicted until March, 1915.

It appeared that after the discovery of his acts, he was discharged by the Bank and thereafter, with the assistance of his friends and relatives, made full restitution to the Bank, and that its officials did not desire to prosecute him for the offense.

It appeared that the young man had taken this money under circumstances which made him appear foolish rather than vicious, as it was obvious that he would be detected.

It appeared that he was thoroughly repentent and that he had suffered acutely for his misconduct, among other reasons because of the fact that his discharge from the Bank and the reason therefor had become known to all of his friends and business associates.

From all the circumstances it appeared that his punishment was as complete and effective in these circumstances as if he had been in fact imprisoned in the penitentiary. The young man had been recently married and it was obvious that his wife and her people were obliged to share and bear the burden of his disgrace and it seemed unnecessary to add to that burden by imprisoning him in the penitentiary.

It appeared that he was the support of his widowed mother and that his imprisonment would leave her dependent upon the charity of relatives and friends.

It was made to appear that following his discharge from the Bank and the restitution of the amount embezzled, he was given a responsible position and was giving strict attention to his business and was conducting himself in every respect in a proper manner and endeavoring to so properly conduct himself and live among the people who knew of the offense he had committed.

The order of suspension entered by respondent was recommended by the Right Reverend Joseph Schrembs, Bishop of Toledo, and by the Reverend James P. McCloskey, Pastor of St. Patrick's Church, of which Henahan was a communicant.

There was also exhibited to respondent, at or about the time said order of suspension was made, an application for a pardon signed by

Isaac R. Sherwood, Member of Congress;

Frank B. Niles, Collector of Internal Revenue;

Edwin J. Lynch, State Senator;

John P. Kelly, Clerk of Courts;

John P. Manton, Byron F. Ritchie, Curtis T. Johnson, Bernard F. Brough, the Four Judges of the Common Pleas Court of Lucas County, Ohio;

O'Brien O'Donnell, Probate Judge of Lucas County, Ohio;

George E. Parrish, Post Master of Toledo, Ohio, and many other prominent citizens of Toledo.

Respondent was also informed at said time by Mr. Morrison W. Young, President, and Mr. William C. Carr, Vice-President of The Second National Bank, that the Bank had no desire to prosecute Henahan and that they recommended a suspension of sentence and would recommend a pardon.

In the circumstances which were thus made to appear, although it might be claimed that the execution of a sentence of ten (10) years imprisonment would not be unjust so far as Henahan was concerned, inasmuch as he had committed the offense and perhaps should have anticipated the penalty, respondent took the view that the imposition of that sentence would nevertheless be unjust to society, as it would, without any question, result in the loss, or at least prevent the making of a useful citizen.

Respondent respectfully submits that the function of the District Court of the United States is to administer justice and that the imposition of a sentence of five or ten years in the penitentiary in the circumstances heretofore set forth, would have been unjust, and that it was within the power of the District Court of the United States, in said circumstances, to suspend indefinitely the execution of said sentence.

Respondent respectfully refers to the brief of his counsel, and the authorities therein mentioned, in support of the claims made in this answer.

Respondent respectfully submits to and will abide the judgment of this court and will enforce, by proper orders or action, any direction given by this court in the premises.

JOHN M. KILLITS,
Judge of the District Court of the United States, for the Northern District of Ohio.

EDWIN J. MARSHALL,
Counsel.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1915

EX PARTE: THE UNITED STATES, *Petitioner*

BRIEF FOR THE RESPONDENT

Many Robbed of Its Sting
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1915
No. 12 Original

EX PARTE THE UNITED STATES,

Petitioner.

BRIEF ON BEHALF OF RESPONDENT.

This is a mandamus proceeding brought in this court by the Attorney General for a peremptory writ against John M. Killits, Judge of the District Court for the Northern District of Ohio, Western Division, to require him to vacate a certain order suspending the execution of a sentence of imprisonment against one James J. Henahan.

The proceeding was brought to determine the power of district courts to suspend sentences.

Henahan was indicted on four counts for embezzlement from a national bank, the penalty for which, under §5209, R. S., was imprisonment for not less than five years on each count. He had made restitution to the bank and pleaded guilty, and, in accordance with the practice of State and Federal courts in Ohio, asked that he be given a suspended sentence, that is, that sentence be entered and its execution suspended.

Upon consideration of the facts and circumstances of the case, Judge Killits imposed the only sentence possible un-

der the statute, a concurrent sentence of five years, and entered an order suspending execution until the further order of the court.

The facts and circumstances moving the court to enter this order appear in the answer of Judge Killits.

My knowledge of the history and philosophy of our law is so limited, I present my views—ill arranged and sadly needing revision—with many misgivings, and regret that I cannot assert the law applicable to this case with the confidence of the Assistant Attorney General.

It has been the practice of courts to suspend sentence in one of two ways: first, by suspending imposition, and second, by suspending execution. Although in the case at bar, the court, following the practice common in State and Federal courts in Ohio, suspended execution of sentence, I shall discuss both the power to suspend imposition and the power to suspend execution as it seems that if the courts have one power, they must have the other.

The power of the courts in question in this suit is the power to suspend sentences indefinitely. The power to suspend sentences temporarily is recognized by all the authorities.

The power of a court to suspend sentence against the objection of a defendant is not raised by this record.

The power to suspend sentences capriciously does not exist and is not claimed.

The subject under consideration is naturally divided into three parts:

The extent of the exercise of this power at common law before its adoption in this country, the extent of the exercise of the power at the present time, and the exercise of the power by the Federal courts.

I shall discuss the subject under the following heads:

1. That the power existed and was exercised at common law, but if there is any question as to that, the propriety of the exercise of the power to suspend sentences indefinitely is now recognized.

2. That it is one of the implied powers of our Federal courts.

3. That by the continuous exercise of the power the statutes creating our Federal courts and those prescribing penalties for crimes have been construed in practice to admit the exercise of this power by the courts.

4. The exercise of this power is not an invasion of the pardoning power for the two powers existed and were exercised at common law and it has been determined by practical construction that the judicial exercise is not an invasion of the executive power.

5. The courts may retain jurisdiction after the close of terms of court for the purpose of completing the exercise of this power.

6. A defendant may have a right to a suspension of sentence in some circumstances.

7. What facts should be shown or appear to make it proper for a court to suspend a sentence.

There are many collateral questions which might be considered in an effort to reach a proper conclusion, but I believe the foregoing will serve as a sufficient outline of the points to be discussed in this brief.

There have been many decisions of State courts on the main question in this case, but they are so conflicting as to be of little value as a whole. In each case the court states

what it believes the common law to have been and proceeds from that to its own conclusion, either for or against the existence of this power. The conflicting conclusions of the State courts on this point are all based on the same authorities.

Under the directions of the respondent, I shall refer to authorities which are against my contentions, as well as those which are favorable.

1. The Power Existed and Was Exercised at Common Law, but if there is Any Question as to that, the Propriety of the Exercise of the Power to Suspend Sentences Indefinitely is Now Recognized.

To what extent did courts at common law exercise the power to suspend sentences in criminal cases?

Upon this subject the authorities I have been able to find are Hale's Pleas of the Crown, Hawkins' Pleas of the Crown, Blackstone's Commentaries, Chitty's Criminal Law and Dyer's Reports.

In *Hale's Pleas of the Crown,* Volume 1, Chapter XXVII, page 367, we find the following:

> "IV. Lastly, touching execution of judgments of treason, they are directed by the judgment, whereof before.
>
> "There be nevertheless some things, that accidentally happen, that suspend or abate the execution.
>
> "1. Reprieves *ex arbitrio regis vel judicis,* the king may by command or precept under his great or privy seal, privy signet, or sign manual, yea by signification under the hand of the secretary of state, or at this day by the subscription of a master of requests, command the reprieve of one condemned of treason or felony.
>
> "And altho the judge, by whom judgment is given, ought to be very cautious in granting a reprieve of one condemned for treason before him, yet he may, upon due circumstances do it, as well in case of treason, as felony.

"And this reprieve he may grant, and after he hath granted it may command execution after the sessions and adjournment of the commission. Dy. 205.

"There are other reprieves, which are not arbitrary, but *quasi de jure.*"

Hale then mentions two causes of reprieve *quasi de jure;* pregnancy in case a judgment in treason or felony is given against a woman, and insanity occurring between the judgment and the execution.

In *Chapter LVIII,* Volume 2, page 412, we find the following under the title "Concerning reprieves before or after judgment."

"Reprieves, or stays of judgment or execution are of three kinds, viz.:

I. *Ex mandato regis,* thus we find it done in 3 H. 7. 7. a. tho *ore tenus,* or by some message, or by sending his ring, but at this day it is ordinarily signified by the privy signet, or by the master of requests.

II. *Ex arbitrio judicis.* Sometimes the judge reprieves before judgment, as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment insufficient, or doubtful whether within clergy; and sometimes after judgment, if it be a small felony, tho out of clergy, or in order to a pardon or transportation. Crompt. Just. 22, b. and these arbitrary reprieves may be granted or taken off by the justices of goal-delivery, altho their sessions be adjourned or finished, and this by reason of common usage. Dy. 205 a.

III. *Ex necessitate legis,* which is a case of pregnancy, where a woman is convict of felony or treason."

In *Chapter LVI,* Volume 2, page 401, Hale discusses the power of a judge to give judgment upon a conviction before another judge and shows the enactment and effect of laws to permit this to be done.

"And, therefore, the statute of 1 E. 6, cap. 7 was made, which among other things enacts, 'That where any person shall be found guilty of treason or any

felony, for which judgment of death should be given, and be reprieved before judgment, new commissioners of goal-delivery may give judgment upon such conviction, as the justices of goal-delivery, before whom he was convicted, might have done.'

* * * * *

"Tho this statute in the first part thereof mentions giving of *judgment* upon a person convict, yet I take it very clear they may award *execution* upon a party reprieved after judgment by former commissioners, for by the second clause they may proceed in *every behalf* as the former commissioners might have done, and therefore there is little cause for the *quaere* made touching that point in Dyer 165 a., yet I have generally observed this one rule, that I would never give judgment, or award execution upon a person reprieved by any other judge but myself, because I could not know upon what ground or reason he reprieved him."

There is a note in the *First American Edition of Hale's Pleas of the Crown,* at this point, as follows:

"The usefulness of this caution may be seen from what is observed by Sir John Hawles in his remarks on Cornish's trial, State Tr. Vol. IV, p. 203, where he relates the case of some persons 'Who had been convicted of the murder of a person absent barely by inferences from foolish words and actions; but the judge before whom it was tried was so unsatisfied in the matter, because the body of the person supposed to be murdered was not to be found, that he reprieved the persons condemned; yet in a circuit afterwards a certain unwary judge, without inquiring into the reasons of the reprieve, ordered execution and the persons to be hanged in chains, which was done accordingly; and afterwards to his reproach the person supposed to be murdered appeared alive.' "

See also on the same point 2 Hale 35.

In *Volume 1,* page 19, in the discussion of infancy, Sir Matthew Hale says:

"That if he be above ten years and a half, and appears *doli capax,* yet if under fourteen years, he is not

> to be punished *poena ordinaria*, but it may have some relaxation *ex arbitrio judicis*. But although our law indulges a power to the judge to reprieve before or after judgment an infant convict of a capital offense in order to the King's pardon, yet it allows no arbitrary power to the judge to change the punishment that the law inflicts."

Again, at page 26, he says that an infant capable of knowing the difference between good and evil may be convicted and punished, yet the judge, according to the offense and circumstances, may or may not reprieve him before or after judgment in order to the obtaining of the King's pardon.

In *Vol. 2*, Chapter XLII, on page 309, Sir Matthew Hale discusses what is to be done in a case of an unreasonable verdict and says:

> "But what if a juror give a verdict against all reason, convicting or acquitting a person, indicted against evidence, what shall be done?. I say, if the jury will convict a man against or without evidence, and against the direction or opinion of the court, the court hath this salve to reprive the person convict before judgment, and to acquaint the king, and certify for his pardon."

In *Hawkins' Pleas of the Crown*, Volume 2, Chapter 51, § 8, the following is found:

> "SECT. 8. Eighthly. It seems agreed, That every court, which has power to award an execution, has also of common right a discretionary power of granting a reprieve; as where a person pleads a pardon defective in point of form, but sufficiently shewing the king's intention of mercy; or where it is doubtful whether the offense be not included in a general statute-pardon; or whether, as it is laid in the indictment, it amounts to so high a crime, as that with which the prisoner was charged. And it seems agreed at this day, That judges continue to have this power after their commission is determined."

In *2 Hawkins' Pleas of the Crown,* Section 144 of Chapter 33, it appears:

> "But the judges of assize, according to the circumstances of the case, frequently reprieved convicts tried before them, for the purpose of applying to the crown for a pardon, on condition that such convicts should be transported to America; in which case such convicts were obliged to lie in goal until the coming of the judges at the subsequent assize."

He also shows that to remedy this inconvenience, it was enacted by 3 Geo. 3, c. 15, that the intention of the crown in the matter might be certified to the judge who might then order immediate transportation.

In *2 Hawkins' Pleas of the Crown,* Section 8 of Chapter 6, this appears:

> "Also notwithstanding the commission of justices of goal-delivery be in strictness determined after the end of their session, yet it seems to be settled at this day, That they have power either to order the execution or reprieve of the persons who have been condemned before them."

In *2 Hawkins' Pleas of the Crown,* Section 40 of Chapter 15, this appears:

> "Also it seems, That the court of king's bench, or justices of goal-delivery, may bail a person convicted of manslaughter, or, as some say, of any other felony, for which he afterwards gets the king's pardon."

In *2 Hawkins' Pleas of the Crown,* Section 65 of Chapter 15, this appears:

> "Also if a man be convicted of manslaughter before such justices, (justices of goal-delivery) against plain evidence, it is said they may bail him till the next sessions of goal-delivery, in order to purchase his pardon in the meantime."

In *Blackstone's Commentaries,* Book IV, Chapter 31, we find the following:

"The only other remaining ways of avoiding the execution of the judgment are by a reprieve, or a pardon; whereof the former is temporary only, the latter permanent.

1. A reprieve, from *reprendre,* to take back, is the withdrawing of a sentence for an interval of time; whereby the execution is suspended. This may be, first, *ex arbitrio judicis;* either before or after judgment; as, where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offense be within clergy; or sometimes if it be a small felony, or any favorable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of goal-delivery, although their session be finished, and their commission expired, but this rather by common usage, than of strict right."

Blackstone also mentions reprieves *ex necessitate legis,* such as the reprieve of a convicted woman in certain circumstances and the reprieve of an insane person.

In *1 Chitty's Criminal Law,* Chapter XIX, page 757, we find this:

"If the defendant does not succeed in reversing the judgment, there are yet two modes by which he can stay or prevent its execution. The first of these operates only in capital cases—a reprieve, which merely delays the execution; the second—a pardon, may be granted in any case, and is an absolute bar to punishment, as well as to all subsequent proceedings.

"The term *reprieve* is derived from *reprendre,* to keep back, and signifies the withdrawing of the sentence for an interval of time, and operates in delay of execution. It is granted either by the favor of his majesty himself, or the judge before whom the prisoner is tried on his behalf, or from the regular operation of law, in circumstances which render an immediate execution inconsistent with humanity or justice.

"This temporary mercy may be extended *ex mandatio regis,* or from the mere pleasure of the crown, expressed in any way to the court by whom the execu-

tion is to be awarded. This intention of his majesty may be signified *ore tenus*, by a verbal message, or by sending his ring in token of his design; but, at the present day, the intimation is usually made by the privy signet, or the master of the requests. On this the judge, of course, grants the prisoner a respite, either for a limited time, or during the pleasure of his majesty."

Chitty cites "Williams, J., Execution and Reprieve," referring to "The Whole Law Relative to the Duty and Office of a Justice of the Peace," by Thomas Walter Williams, the third edition of which was published, in 1812, and edited by H. Nuttal Tomlins.

I am informed that this work contains the following:

"It seems agreed that every court which has power to award an execution has also of common right a discretionary power of granting a reprieve as where a person pleads a pardon defective in point of form, but sufficiently showing the king's intention of mercy or when it is doubtful whether the offense be not included in a general statute pardon, or whether as it is laid in the indictment it amounts to so high a crime as that with which the prisoner was charged." 2 Hawk. c. 51, s. 8.

In *2 Dyer*, 235 a, it appears that during the fourth year of the reign of Queen Elizabeth (1561) a person killed his master and the word "*traiterously*" was not in the indictment. The court deemed the crime petit treason, and so within a general pardon by statute, and not murder which was excepted by the act.

"And upon this indictment of murder the party was arraigned and found guilty, and yet Walshe, justice, reprieved the prisoner without judgment at the last assizes, for which he was blamed by some, but without cause, as it seemed to the Judges."

In *2 Dyer*, 205 a. (about 1561) the question was submitted to the King's Bench, whether the justices of assize

could, after the session had adjourned, lawfully command the sheriff to respite the execution still longer. This appears:

> Hunt.
>
> "Justices of goal delivery who have respited a prisoner, may in vacation after the adjournment of the sessions make order for further respite, by the custom of the realm."
>
> "(5) It was moved by the Justices of assize there, if a thief be condemned to be hanged, and yet the Justices command the sheriff to respite his execution for six weeks only; and after the sessions adjourn, s. in the vacation before the six weeks expire, the said Justices command the sheriff to respite the execution still longer; *quaere*. Whether they can do this, because their commission of goal delivery seems to be finished by the adjournment; and it is usual to have a new commission every time they come to the sessions of goal delivery. And yet by the opinion of all the Justices the order of further respite is good enough; and the custom of the realm has always been so."

In *2 Dyer*, 165 a, there is:

> "Also *quaere*, if Justices of Oyer or Goal-delivery reprieve any prisoner after judgment of death, whether the new justices may command execution upon him by reason of the words of the statute, which are of reprieves before judgment."

This point was discussed by *Hale* in Volume 2, Chapter LVI, page 401, and by *Hawkins* in Volume 2, Chapter 6, § 8.

These are all the authorities I have been able to find and the question is, do these sustain the power to indefinitely suspend sentences? I must confess I cannot satisfactorily answer the question. It does seem that from the use of the word "reprieve," a definite, rather than an indefinite suspension was meant, but, on the other hand, it must be noticed that judicial reprieves were either arbitrary or from the necessities of the law; that is, either *ex arbitrio judicis* or *ex necessitate legis*.

Reprieves were granted by the King or by the judges, and if by the judges, were either discretionary with them or from the necessities of the law.

Reprieves *ex necessitate legis* covered all the cases which are now covered by temporary suspensions. In a case of insanity a temporary suspension would provide time to make the necessary inquest. In case of pregnancy of a woman convicted of a crime a temporary suspension for a definite time would be sufficient. If appeals could have been taken at common law, a definite suspension would have protected the defendant, pending his appeal. By a definite or temporary suspension the courts can obtain the time necessary for the consideration of the sentence to be imposed.

Reprieves *ex necessitate legis* were of great antiquity and seem to have come from the Roman law.

See:

1 Pollock and Maitland, 103 note.

I believe reprieves *ex necessitate legis* were granted when according to the term the necessities of the law required, but reprieves *ex arbitrio judicis* were granted in those cases in which otherwise injustice would be done.

This I believe to have been the means used by the courts in extraordinary cases to prevent the enforcement of the law resulting in injustice. Is not the prevention of injustice one of the necessities of the law?

It seems to me the courts assumed the power to administer justice and exercised the power to reprieve whenever it appeared that injustice would result from a judgment of conviction or the execution of such a judgment.

I understand perfectly that criminal jurisdiction is the power and authority constitutionally conferred upon a court to take cognizance of an offense and to pronounce the judgment or sentence provided by law, but I believe the common law in the interests of justice provided for the exceptional

cases by this power, or, to put it another way, the sentences fixed by statute law were subject to the exceptions which could be made by the exercise of this power.

The Supreme Court of New Jersey in the *Addy* case, *post*, says:

> "It would seem that it is stating the matter too broadly to assert that it is always the imperative duty of a court to render judgment upon a conviction of crime, unless some legal proceeding for review be interposed. Considerations of public policy may induce the court to stay its hand."

It appears in Hale that reprieves *ex arbitrio judicis* were granted both before and after judgment. If the courts were entirely lacking authority and were obliged to enforce the letter of the law in all cases, how could they reprieve before judgment, and particularly how could they reprieve for any purpose except to allow time for the exercise of the King's prerogative to pardon?

It appears in Hale, however, that sometimes a judge reprieved before judgment, as where he was not satisfied with the verdict, or the evidence was uncertain, or the indictment insufficient, or doubtful whether within clergy, and sometimes after judgment, if it be a small felony, though out of clergy, *or in order to a pardon or transportation.*

It seems clear from this that these arbitrary reprieves were not limited to cases in which a pardon was to be sought, for Hale says the power could be exercised in certain circumstances, *"or in order to a pardon or transportation."*

But, in another place, we find Hale states that judges had no arbitrary power to change the punishment the law inflicted, even against an infant, but should reprieve in order to the King's pardon, and so in case of an injust verdict, the judge should reprieve before judgment and acquaint the King and certify for his pardon.

Of course, it must be remembered that in certain cases pardons were granted as a matter of right, and in many cases

the request for the King's pardon was made as a matter of form and courtesy and not because the pardon might be denied.

For instance, one who committed homicide in self-defense could not be acquitted, but must be found guilty and allowed to seek the King's pardon.

It may be that in many instances convicts were allowed to go on reprieves, possibly in order to the King's pardon, and they never asked or cared for a pardon.

With us an accomplice who testifies for the prosecution is entitled to have his trial postponed, so that he may apply for a pardon to which he is entitled *ex debito justitiae*, but it is doubtful if the records of pardons in the Department of Justice will show one case in a hundred in which a pardon was asked on that ground.

Hawkins says that every court which has power to award an execution has also of common right a discretionary power of granting a reprieve.

He does not state clearly that reprieves were granted only in order that the convicted persons might seek pardons, but it is shown that that was one of the purposes for which reprieves were granted.

It appears that judges bailed convicts pending their application for pardon.

Whether or not reprieves were granted in cases in which pardons were not to be sought, it must be remembered that pardons then were purchasable and in many cases were granted as a matter of right.

It also seems important to note that the award of execution was a judicial act and that the court, having the power to award execution, also had the power to grant a reprieve.

See:

Clifford vs. Heller, 63 N. J. L., 105 (1899);
Contra as to Magistrate.
Re Thomas Lynch, 12 Can. Crim. Cas., 141.

If the court was bound to cause the penalty of the law to be executed, the award of execution would appear to be ministerial rather than judicial.

Chitty says the term reprieve signifies the withdrawal of the sentence for a limited time, and operates in delay of execution and a reprieve may be granted in circumstances which render an immediate execution inconsistent with humanity or justice.

If humanity and justice may require a temporary reprieve, why not an indefinite suspension or reprieve?

Any penalty whatsoever may be inhuman and unjust, and if so, why not suspend the whole penalty indefinitely instead of for a definite time? If the courts had power to do justice in circumstances in which the enforcement of the law would be unjust, they must have had the power to indefinitely suspend sentences in some cases.

Chitty says reprieves were granted only in capital cases, but Hale says that reprieves were granted after judgment of conviction of small felonies.

In Dyer's Reports, it clearly appears that the justices controlled execution of judgments.

The most important case is reported in 2 Dyer, 235 a, from which it appears that a prisoner was reprieved without judgment by a judge, for which he was criticized by some, but his action was approved by the judges. He certainly could not have been subject to censure if he had merely reprieved the prisoner for a definite period.

Some of the English cases have an important bearing on this question.

It seems reasonable to assume that the English courts have had a continuous memory of their proper powers and practices. It is not likely the English judges would assume to exercise this power unless there was good reason or precedent for it. In this view I cite three English authorities.

Keen vs. Queen, 10 Q. B., 928 (1847), merely holds that a Court of Quarter Sessions may respite a judgment from one Session to another to determine the judgment to be entered.

Two English courts held they had the power to suspend the imposition of sentence indefinitely.

In *Queen vs. Richardson,* 8 Dowling's Practice Cases, 511 (1840), the defendants were indicted for conspiring to publish libels to extort money. One defendant pleaded guilty on condition of being discharged, on entering into his own recognizance to appear and receive judgment when called on, and that he should not be called on at all, if he discontinued the publication of libels upon the prosecutor.

The Queen's counsel asked the judgment of the court upon the defendants.

> "Jervis, on behalf of H. Richardson, objected, that that course was irregular. This defendant pleaded guilty to part of the charge against him, on condition that he should not be called up to receive judgment, if he ceased publishing libels on the prosecutor. From that time to the present, he has complied with the condition of his recognizance, and has ceased to have any connexion with the paper in question. The object of the prosecutor in adopting the present course is, to obtain the costs, which he cannot have, till judgment has been pronounced upon the defendants; but as no arrangement was made respecting costs, that is no ground for proceeding."
>
> "Lord Denman, C. J.—It ought, we think, to appear by affidavit that this defendant has written something of a libellous nature upon the prosecutor, since entering into his recognizance not to do so; if it does not appear that he has published any such libel since the trial, the Court will not feel called on to pronounce judgment. As to costs, they should have been taken care of at the time; it is much better that such things should be clearly expressed in writing, than be left to mere vague and general understanding."
>
> "As to this defendant, the Court gave no judgment."

In *Regina vs. Ryan,* 7 Cox Crim. Cas., 109 (1855), an

was "put forward;" whereupon the Queen's Counsel stated that before proceeding with the case he thought it right to mention that there had been a previous conviction against the prisoner upon which judgment had not been pronounced; and if the court would now proceed to pass sentence, the ends of justice might be effected without proceeding with the present indictment.

It appeared that the former indictment against defendant was for stabbing his wife and upon his agreement to behave, the Counsel for the Crown consented to his being discharged without receiving sentence on his entering into the usual recognizance to appear and abide the judgment of the court whenever duly summoned.

As the defendant had not kept his promise, but had made a more serious attack upon his wife, the Queen's counsel moved the court that judgment should be passed upon the prisoner, and as evidence of the prisoner's breach of understanding, the finding of the second indictment might be taken into consideration by the court.

After the entries on the records were read, the prisoner was asked if he had anything to say why judgment should not be pronounced, and the prisoner made a statement:

Monahan, C. J., said:

> "We are going to sentence you for the crime to which you pleaded guilty on June last."

Sentence of four years' imprisonment followed.

In *9 American Law Review*, 600 (1875), is to be found a report of a suspension of imposition of a sentence in England.

> "A Scene at The Chester Assizes.—An occurrence perhaps without a parallel was witnessed at the close of the assizes at Chester, of which the Manchester Guardian gives the following account:—
>
> 'Mary Lancaster, thirty-three, was indicted for the manslaughter of her husband, John Lancaster, at Birkenhead. The deceased had long led the prisoner

a wretched life; and on the 13th of September he came home drunk, and kicked over the meat which she was preparing for his dinner. He then thrashed her, and in a passion the prisoner threw at him a sharpening steel, and caused his death. The prisoner was a hard-working woman, and, in spite of her husband's brutal treatment of her, had done her best to make his home comfortable. The jury found the prisoner guilty. Mr. Justice Brett, addressing the prisoner, then said. I believe that if I thought it right to act according to my own feelings, I should say nothing about this unhappy husband of yours. As far as I can see, you were a respectable, hard-working, well-behaved wife, and I feel bound to say a greater brute than your husband was I have seldom heard of. There are circumstances in the depositions even worse than those which have been brought forward. They show that, even on the very last day you were together, you were doing all you could to make his home comfortable, and to make him happy. With a brutality which made me shudder when I read it, he cast away that which you had prepared for him. He has been beating and ill-treating you for months, probably for years; and it is nothing but the tenderness and forgiveness of the woman and wife which prevented you from having him punished for crimes he committed against you time after time. It is only when he had driven you to desperation by ill-treating you the whole day, and I dare say was on the point of ill-treating you again, that you, in a moment of passion, took up a formidable weapon and threw it at him, I believe, without the intention of striking him. It did strike him, and you immediately ran for assistance, and did all you could to save him. All the real right in this case was on your side; all the real wrong on your husband's; and God forbid that I should punish you. I will be no party to it; I will not even make this judgment complete; I will not allow it to be said by anybody that you are a convicted felon (hear, hear),—for a conviction is not complete until a sentence is passed, and I mean to pass no sentence at all. (Loud cheering, which for some time the officials of the court vainly endeavored to suppress.) I shall merely ask you to enter into your own recognizance to come up

> for judgment if called upon, and nobody in the world will ever call upon you,—God forbid they ever should. (Renewed cheering, during which the prisoner left the dock.)'"

This instance of the exercise of this power by one of the most distinguished English Judges and Hale's statement that the power was exercised in cases of treason would seem to answer the fear expressed on page nine of the government's brief, that if the power may be exercised in minor offenses, it may also be used in cases of murder, treason and the graver offenses.

The character of the offense does not furnish the test, but rather the facts and circumstances making the imposition or execution of sentence unjust.

The English courts seem to have exercised the right to suspend the imposition of sentence or judgment in cases against the inhabitants of a community for failure to repair bridges or roads and in one case a judgment of acquittal was suspended.

See:

> King vs. Inhabitants of Wandsworth, 1 Barnewall & Alderson, 63 (1817).
>
> Rex vs. Inhabitants of Southampton, 2 Chitty, 215 (1818).

I have been unable to find any other English authorities, except a note to the case of *King vs. Inhabitants of the County of Oxford*, 13 East, 411 (1811), in which it is said:

> "In capital cases at the assizes, if a conviction take place upon insufficient evidence, the common course is to apply to the Crown for a pardon, upon a full report of the evidence sent in by the learned Judge to the Secretary of State for the home department; but I am not aware of any instance of a new trial granted in a capital case; and upon the debate of all the Judges in Margaret Tinkler's case, in 1781, it seemed to be considered that it could not be. The authorities are

> numerous that an inferior jurisdiction cannot grant a new trial upon the merits, but only for an irregularity."

The conclusion of common law judges that they had the power to grant arbitrary reprieves may have been founded upon a recognition of the law of nature.

Blackstone (Introduction § 2) says:

> "This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times; no human laws are of any validity, if contrary to this, and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original."

The respondent is not claiming under the law of nature, but suggests it merely as a possible foundation of the early authorities which recognize the existence of the power now in question.

As pointed out in the brief on behalf of the government, respondent's oath of office was to *"administer justice,"* but he submits to this court the question whether the strict execution of the penalties of the law is necessarily justice, and whether justice does not require the existence and the exercise of the power in question, so that by the strict enforcement of the laws, injustice may not be done.

I do not believe that any additional authorities can be cited or information furnished to show the form and extent of the exercise of this power at common law.

The modern cases in which this question has been considered are all based on these authorities and some hold that the power existed at common law and others the opposite.

A quotation from a decision by Hon. Lindley M. Garrison, sitting as Vice-Chancellor of the Court of Chancery of New Jersey, will give this court a clear understanding of the conflict of modern decisions.

In *Gehrmann vs. Osborne*, 79 N. J. Eq., 430 (1912), he said:

"Upon the question of whether or not a court, irrespective of legislation, has power to suspend sentence indefinitely, authorities differ. Since there is no statute in this state upon the subject, it must be determined by what we find the common law to be.

Upon this subject, there is great contrariety of opinion and direct conflict of decision. Some of the courts draw the inference from the English precedents that at the common law, as there administered, there was nothing in the nature of an indefinite suspension of sentence. Other courts, from the same sources, draw an exactly opposite inference. Some deny that there was any power to suspend sentence at all; others say that there was power to do so temporarily; while others say that there was power to do so indefinitely.

"Such original investigation into the English authorities as I had time to make did not serve to satisfy me that the situation, as there existing, was clearly ascertainable. There is little in the books upon the subject, and much is left to inference. Enough, however, can be gathered from the English precedents to show that courts of criminal jurisdiction exercised the power of delaying the imposition of a sentence for various reasons, and of delaying the operation of an imposed sentence, and did not do this by virtue of any statute, and therefore must have inherently had the power so to do. Each other jurisdiction has determined for itself whether, according to the common law, custom and usage therein, the courts thereof have the power to suspend the pronouncing of a sentence (or to suspend the execution of a pronounced sentence), or have not such power. In each group will be found cases in which the power, if found to exist, or the lack of it, if found not to exist, is traced to the common law as practiced in the English courts; while other cases in each group will be found which affirm or deny the power in accordance with custom, usage, or the practice of the common law, as found to exist in their jurisdictions. In the following cases, it will be found that the courts, for one reason or another, has denied that the court had power to suspend the pronouncing of sentence. *People vs. Morrisette* (N. Y. O. & T.), 20 How. Prac.,

118; *People vs. Allen* (Ill. 1895), 155 Ill., 61, 39 N. E., 568, 41 L. R. A., 473; *People vs. Blackburn*, 6 Utah, 347, 23 Pac., 759; *People vs. Brown*, 54 Mich., 15, 19 N. W., 571; *U. S. vs. Wilson* (C. C.) 46 Fed., 748; *Gray vs. State*, 107 Ind., 177, 8 N. E., 16; *Ex Parte Peterson* (1911), 19 Idaho, 433, 113 Pac., 729, 33 L. R. A. (N. S.), 1067; *State vs. Hilton* (1909), 151 N. C., 687, 65 S. E. 1011; *State vs. Hockett*, 129 Mo. App., 639, 108 S. W., 599.

"In the following cases, the court has held that it had the power to suspend the pronouncing of a sentence: *People ex rel. Forsythe vs. Ct. of Sessions*, 141 N. Y., 291, 36 N. E. 386, 29 L. Ed., 107, 23 L. R. A., 856; *State vs. Drew*, 75 N. H., 402, 74 Atl., 875; *Iowa vs. Voss* (1890), 80 Iowa, 467, 45 N. W., 898, 8 L. R. A., 768; *People vs. Mueller*, 15 Chicago Leg. N., 364; *Weaver vs. People*, 33 Mich., 297; *Re Webb* (1895), 89 Wis., 354, 62 N. W., 177, 27 L. R. A., 356, 46 Am. St. Rep., 846; *State vs. Crook* (1894), 115 N. C., 760, 20 S. E., 513, 29 L. R. A., 260; *Weber vs. Ohio* (1898), 58 Ohio St. 616, 51 N. E. 116, 41 L. R. A. 472; *Green vs. State* (1908), 88 Ark., 290, 114 S. W. 477; *Commonwealth vs. Dowdican*, 115 Mass., 136; *Marks vs. Wentworth* (1908), 199 Mass., 44; 85 N. E. 81; *Ex Parte St. Hilaire* (1906), 101 Me., 522; 64 Atl. 822, 8 Ann. Cas. 385.

"The following cases concern the power of a court to suspend the execution of an imposed sentence; some holding that it has the power, and others that it has not: *Ex parte Clendenning*, 22 Okla. 108, 97 Pac. 650, 19 L. R. A. (N. S.) 1041, 132 Am. St. Rep. 628; *Clifford vs. Heller* (Sup. Ct. 1899), 63 N. J. Law, 105, at page 116, 42 Atl. 155, 57 L. R. A. 312; *People vs. Cummings*, 14 L. R. A., 285; notes; *State vs. Voss, supra; Re Webb, supra; Neal vs. Georgia* (1898), 104 Ga. 509, 30 S. E. 858; 42 L. R. A. 190, 69 Am. St. Rep., 175; *Weaver vs. Ohio, supra; State vs. Abbott* (1911), 87 S. C. 466, 70 S. E. 6, 33 L. R. A. (N. S.) 112; *Wall vs. Jones* (1910), 135 Ga. 425, 69 S. E. 548; *Ex parte Cornwall*, 223 Mo. 259, 122 S. W. 666, 135 Am. St. Rep. 507; *State vs. Smith* (1910), 173 Ind., 388; 90 N. E., 607; *Tanner vs. Wiggins* (1907), 54 Fla. 203, 45 South. 459, 14 Ann. Cass., 718.

"Since the cases as cited above which affirm the power are properly based upon a finding of the exist-

ence of such power in the court by virtue of the custom, usage, and the common law as administered in that court, the next inquiry is, What is the fact with respect to our own state?

"From such inquiry as I have made I find that an indefinite suspension of sentencing has been the custom in this jurisdiction beyond the memory of those now connected with the administration or practice of the criminal law in this state. Such references as are made to the matter in reported cases bear out the inference that such custom has been one of long existence in this jurisdiction. *State vs. Addy, supra; State vs. Henson, supra.* (Collins, J., in dissenting opinion, 66 N. J. Law, 610, 50 Atl., 616); *Blazier vs. Keffer, supra. Clifford vs. Heller, supra.*

"The conclusion which I have therefore reached is that in the state of New Jersey if a defendant has pleaded *nolo contendere*, or guilty, or has been convicted upon trial, the court has the power, if the defendant does not object thereto, and therefore is assumed to assent thereto, to refrain from pronouncing a judgment or sentence, and may, at a subsequent time, hale the defendant before it, and impose the punishment in the same manner that it would have been justified in pronouncing it upon the very day when the case was first ripe for sentence."

In *People ex rel. vs. Court of Sessions,* 141 N. Y. 288, 293 (1894), Judge O'Brien said:

"Without attempting to collate all the authorities on the subject, it is sufficient to say that the power to suspend sentence at common law is asserted by writers of acknowledged authority on criminal jurisprudence, by the uniform practice of the courts and numerous adjudged cases."

I believe the continuous exercise of the power by our judges furnishes the best reason for the belief that the power existed and was exercised in its present form at common law.

The Assistant Attorney General in his brief uses this statement:

"This claim, however, lacks historical justification, and such suspension is a pure usurpation, the anomalous character of which is frequently recognized."

I cannot believe that our judges have knowingly usurped this power, and when I find it has been exercised, in one form or another, by judges, such as Justices Brown, Matthews, Lurton, Jackson and Blatchford before they came on this court and by other State and Federal judges of the highest standing, and by Mr. Justice Brett, afterwards Lord Esher, I am forced to believe they had good authority for their acts, and in the absence of recorded precedent, I must believe that this has been one of the traditions handed down from one judge to another. I believe that if the records of our courts were searched this would be demonstrated. I cannot understand, upon any other theory, the English cases I have cited, for it does not seem probable that those judges would have allowed reports of those cases to be printed had they understood they were usurping powers that belonged to the Crown.

Respondent does not claim the power to capriciously suspend sentence and there is no authority for such exercise of the power. This is not the only power vested in our courts without definite limitations, but to be exercised only in proper circumstances.

Judge O'Brien in the New York case said:

> "It is a power which the court should possess in furtherance of justice, to be used wisely and discreetly, and it is perhaps creditable to the administration of justice in such cases that while the power has always existed, no complaint has been heard of its abuse."

In *State vs. Crook*, 115 N. C., 760 (1894), the Supreme Court of North Carolina said:

> "The exercise of this discretionary power has not heretofore been questioned, and the beneficial effects of its judicious use have been made so manifest as to commend it both to the Judges and the people."

This court in many cases has refused to lay down hard and fast rules for the exercise of discretionary powers by judges and has deemed it sufficient to say that they should not

be exercised capriciously or arbitrarily but in conformity with the general rules which have been sufficient guidance for the courts in the past.

In view of the claim that the old authorities do not clearly establish the exercise of this broad power at common law, the court should consider the possible reasons for the lack of definite precedent. It may have been the common practice and still no record might be left in the form of decisions. Judge Brown, later Justice Brown, suspended sentences in four hundred and fifty-six cases, while sitting as District Judge in Detroit, but there is no reported decision to be found in any of the cases. It should be noted that there is but one reported Federal decision on this point in the whole country though the power has been exercised in a great many hundred cases. This may have also occurred at common law and it seems is likely to have been the case since there were, no doubt, but few criminal cases in which the exercise of the power would be proper.

It is my conclusion, supported by several of our State decisions and these old authorities, that the power was exercised at common law in the form and to the extent now complained of.

A brief summary of State decisions is here given. While no general rule may be deduced from them, it seems clear that the trend of opinion favors the exercise of the discretion in one form or another.

Arkansas.

The courts have power to suspend imposition of sentences and to sentence at a term subsequent to that at which plea or verdict was entered.

Cox vs. State, Ark. (1914), 169 S. W., 789;
Barwick vs. State, 107 Ark., 115 (1913);
Joiner vs. State, 94 Ark., 198 (1910);

Greene vs. State, 88 Ark., 290 (1908);
Thurman vs. State, 54 Ark., 120 (1891);

See:

Phillips vs. State, Ark. (1911), 140 S. W., 734.

California.

Sentence need not be imposed at the same term at which verdict of guilty is found. A defendant may waive his right to be immediately sentenced as required by statute. Imposition of sentence may be suspended.

People vs. Patrich, 118 Cal., 332 (1897);
People vs. Robinson, 46 Cal., 94 (1873);
People vs. Felix, 45 Cal., 163 (1872);
People vs. Robertson, 6 Cal. App., 514 (1907);

See:

Ex parte James Morton, 132 Cal., 346 (1901).
In re Giannini, 18 Cal. App. 166 (1912).

An order suspending execution of sentence by withholding commitment may be revoked and sentence enforced.

In re Collins, 8 Cal. App., 367 (1908).

Colorado.

It is held that sentence must be imposed during the term in which plea or verdict is entered, and sentence cannot be postponed even at the request of the defendant, and that passing the case beyond the term results in loss of jurisdiction.

The *Mann* case, so often cited, has no bearing on the question. In that case there was no order of suspension. Judgment was entered, but, in anticipation of an appeal, no commitment was issued. Mandamus proceedings were brought to require the issuance of a commitment.

Grundel vs. People, 33 Colo., 191 (1905);
Mann vs. People, 16 Colo. App., 475 (1901).

Connecticut.

No reported case in point is to be found, but it is held that courts may suspend execution of sentence to allow an appeal to be taken. The discussion of the common law power to bail after conviction and sentence is interesting.

State vs. Vaughan, 71 Conn., 457 (1899).

See:

Belden vs. Hugo, Conn. (1914), 91 Atl., 369.

District of Columbia.

Sentence may be imposed at a subsequent term, and it seems imposition of sentence may be suspended.

Harris vs. Lang, 27 App. D. C., 84 (1906);
Harris vs. Nixon, 27 App. D. C., 94 (1906);
United States vs. May, 2 McArthur, 512 (1876);

See:

United States vs. Lambert, 2 Cranch C. C. 137, Fed. Cas. No. 15554 (1817);
United States vs. Jennegen, 4 Cranch C. C. 118, Fed. Cas. No. 15474 (1830);
Miller vs. United States, 41 App. D. C. 52 (1913).

Florida.

The imposition of sentence may be suspended, but not the execution of sentence.

Ex parte Williams, 26 Fla., 310 (1890);
Tanner vs. Wiggins, 54 Fla., 203 (1907).

Georgia.

It seems that imposition of sentence may be suspended. but not the execution of sentence. It is held that an order suspending execution of a sentence is void, and sentence may be enforced, and that jurisdiction to enforce the sentence is not lost.

Daniel vs. Persons, 137 Ga., 826 (1912);

Roberts vs. Wansley, 137 Ga., 439 (1912);
Wall vs. Jones, 135 Ga., 425 (1910);
O'Dwyer vs. Kelly, 133 Ga., 824 (1910);
Gordon vs. Johnson, 126 Ga., 584 (1906);
Neal vs. State, 104 Ga., 509 (1898);

See:

Hancock vs. Rogers, 140 Ga., 688 (1913).

Hawaii.

Courts have no power to indefinitely suspend imposition of a sentence and lose jurisdiction by doing so. Temporary and definite suspensions may be made.

Republic of Hawaii vs. Pedro, 11 Hawaii, 287 (1898).

Idaho.

Courts are without power to suspend execution of sentence and jurisdiction is lost by releasing a defendant from custody.

The case of *United States vs. Wilson* should be classed as an Idaho decision, as it turned on the Idaho statutes. That decision denies the power to suspend the execution of a sentence.

In re Peterson, 19 Idaho, 433 (1911);
United States vs. Wilson, 46 Fed., 748 (1891).

Illinois.

The power to indefinitely suspend imposition of sentence is denied in the *Barrett* and *Allen* cases, and, *obiter*, it is said that execution of sentence may not be suspended.

It is held that jurisdiction is lost by long delay, notwithstanding the consent of defendant.

The same court holds constitutional a statute permitting suspended sentences.

It is submitted that the decision of Barnum, J., in the *Mueller* case, upholding the power is better reasoned.

People vs. Mueller, 4 Crim. Law Mag. 725; 15 Chi. Leg. News 364 (1883);

People vs. Allen, 155 Ill. 61 (1895);
People vs. Barrett, 202 Ill. 287 (1903);
People vs. Heise, 257 Ill. 443, 450 (1913).

Indiana.

It seems the courts have no power to suspend the imposition of sentence. It was first held that execution of sentence could not be stayed pending an appeal, but that decision was later overruled. The matter is now regulated by statute.

Gray vs. State, 107 Ind. 177 (1886);

See:

Butler vs. State, 97 Ind. 373 (1884);
Parker vs. State, 135 Ind. 534 (1893);
State vs. Smith, 173 Ind. 388 (1910);
§ 2185 Burn's Statutes.

Iowa.

It seems from the *Ray* case and *dicta* in the *Voss* case that imposition of sentence may be suspended, but it was held in a contempt case that execution of sentence could not be suspended. In the *Evans* case it is held that jurisdiction is not lost by delay in enforcing a sentence.

Miller vs. Evans, 115 Ia. 101 (1901);
State vs. Voss, 80 Ia. 467 (1890);
State vs. Ray, 50 Ia. 520 (1879).

Kansas.

The power to suspend imposition of sentence and execution of sentence is denied. Delay in imposing sentence results in loss of jurisdiction.

In re Strickler, 51 Kan. 700 (1893);
In re Beck, 63 Kan. 57 (1901);
State ex rel. vs. Sapp, 87 Kan., 740 (1912).

Kentucky.

An order suspending execution of sentence is void, as an invasion of the governor's power to pardon and reprieve.

Brabandt vs. Commonwealth, 157 Ky. 130 (1914).

Louisiana.

There are no decisions in point, but *dicta* indicating a denial of the power as an invasion of the governor's power to pardon.

State ex rel. vs. Moise, 48 La. Ann. 109 (1895).

See:

State vs. Fulco, La. (1915), 67 So. 925.

Maine.

The prevailing practice is that of placing the indictment on file and suspending imposition of sentence. This has been held to be proper, but power to suspend execution is denied.

Tuttle vs. Lang, 100 Me. 123 (1905);
St. Hilaire, Petitioner, 101 Me. 522 (1906);
State vs. Sturgis, 110 Me. 96 (1912);
State vs. Talberth, 109 Me. 575 (1912).

Massachusetts.

With the consent of a defendant, but not against his objection, a court of general jurisdiction may suspend imposition of sentence by laying the indictment on file.

Commonwealth vs. Dowdican's Bail, 115 Mass. 133 (1874);
Commonwealth vs. Maloney, 145 Mass. 205 (1887);
Marks vs. Wentworth, 199 Mass., 44 (1908).

Michigan.

The early decisions are confusing, but the practice in fact exists and is sustained by the later decisions.

People vs. Stickle, 156 Mich. 557 (1909);
People vs. Kennedy, 58 Mich. 372 (1885);
People vs. Brown, 54 Mich. 15 (1884);
People vs. Reilly, 53 Mich. 260 (1884);
Weaver vs. People, 33 Mich. 296 (1876);

See:

People vs. Cummings, 88 Mich. 249 (1891);
People vs. Dudley, 173 Mich. 389 (1912).

Minnesota.

The practice is now regulated by statute. There are no decisions in point, but merely *dicta* against the power to suspend indefinitely, although it is held that the right to enforce execution of a sentence continues until the sentence is fully executed.

In re Shaw, 31 Minn., 44 (1883);
State ex rel. vs. Langum, 112 Minn. 121 (1910);
State vs. Waterman, 112 Minn. 157 (1910);
State vs. Fjolander, 125 Minn. 529 (1914).

Mississippi.

Courts have no power to suspend either the imposition or execution of sentences. An order suspending execution of sentence is void and does not affect the sentence or judgment and the defendant may be retaken as on an escape and compelled to perform his sentence. The suspension of imposition of sentence will be treated as a continuance by consent. The first decision in the *Fuller* case upheld the power, but on rehearing the power was denied.

Gibson vs. State, 68 Miss. 241 (1890);
Fuller vs. State, 100 Miss. 811 (1912); 57 So. 6, 806;
Hoggett vs. State, 101 Miss., 269 (1912), 57 So. 9, 811.

Missouri.

It seems that the courts do not have power to suspend either the imposition or the execution of sentence. Long delay in imposing sentence even with the consent of the defendant results in a loss of jurisdiction.

While an order suspending the execution of a sentence is void, delay alone does not result in a loss of jurisdiction, but when such delay has occurred and circumstances are such that society could derive no good from the enforcement of a sentence, a court may refuse to order the execution of sentence.

State vs. Watson, 95 Mo. 411 (1888);
State vs. Hockett, 129 Mo. App. 639 (1908);
Ex parte Bugg, Mo. App. (1912); 145 S. W., 831;

See:

Ex parte Cornwall, 223 Mo. 259 (1909).
Ex parte Parker, 106 Mo. 551 (1891).

Nevada.

In a suit on a bail bond given to perform a suspended sentence it was held the court was without power to stay execution of sentence in view of a statute providing sentence should go into effect immediately.

State vs. Murphy, 23 Nevada 390 (1897).

New Hampshire.

Courts may suspend either the imposition or execution of sentences.

State ex rel. vs. Drew, 75 N. H. 402 (1909);
Sylvester vs. State, 65 N. H. 193 (1889).

New Jersey.

Imposition of sentence may be suspended by a court of general jurisdiction if the defendant consents or does not object, and it seems execution of sentence may be suspended as it is held that the order for the execution of a sentence is a judicial act.

State vs. Addy, 43 N. J. L. 113 (1881);
Gehrmann vs. Osborne, 79 N. J. Eq. 430 (1912);

Blazier vs. Keffer, 79 N. J. L. 252 (1910);
State vs. Brewer, N. J. L. (1904); 59 Atl., 31;
Clifford vs. Heller, 63 N. J. L. 105 (1899);
State vs. Clifford, 84 N. J. L. 595 (1913).

New Mexico.

In the *Folsom* case it was held that execution of sentence could not be suspended, but Judge Pope, now United States District Judge in New Mexico, while sitting judge of the District Court of Chaves County, held the contrary in an unreported case, *"In re Carl Leopold"*, decided December 20, 1909. The power was denied in the *Lujan* case.

United States vs. Folsom, 8 N. Mex. 651 (1896);
In re Carl Leopold, unreported, (1909);
In re Lujan, 18 N. Mex., 310 (1913);
Ex parte Bates, N. Mex. (1915), 151 Pac. 698.

New York.

Courts may suspend either the imposition or execution of sentence.

People vs. Whipple, 9 Cowen 707, 715 (1827);
Miller's Case, 9 Cowen 730 (1828);
People ex rel. vs. Court of Sessions, 141 N. Y. 288 (1894);
People ex rel. vs. Court of Sessions, 66 Hun. 550 (1893);
People ex rel. vs. Court of Sessions, 8 N. Y. Crim. Rep. 355 (1892);
Carnal vs. People, 1 Parker's Crim. Rep. 262 (1851);
People ex rel. vs. Webster, 14 Misc. 617 (1895);
People vs. Harrington, 15 Abb. N. C. 161 (1884);

People vs. Morrisette, 20 How. Pr. 118 (1860);
People ex rel. vs. Flynn, 55 Misc. 639 (1907);
People vs. Graves, 31 Hun. 382 (1884);
People vs. Reed, et al., 1 City Hall Recorder 4, 6, 21, 28, 41 (1816);
People vs. Goodrich, 149 N. Y. Supp. 406 (1914).

North Carolina.

The courts approve the practice of suspending either the imposition or execution of sentences with the consent of defendants.

State vs. Hilton, 151 N. C. 687 (1909);
State vs. White, 117 N. C. 804 (1895);
State vs. Crook, 115 N. C. 760 (1894);
State vs. Warren, 92 N. C. 825 (1885);
State vs. Cockerham, 24 N. C. (Ired. L.) 204 (1842);
Re Leo Hinson, 156 N. C. 250 (1911);
State vs. Hatley, 110 N. C. 522 (1892);
State vs. Bennett, 4 Devereux & Battle's Law 43 (1838);
State vs. Everitt, 164 N. C. 399 (1913);
State vs. Tripp, 168 N. C. 150 (1914).
State vs. Johnson, N. C. (1915); 84 S. E. 767.

North Dakota.

The subject seems to be regulated by statute, but the courts hold that independent of the statute the courts are without power to suspend execution of sentences.

In re Markuson, 5 N. Dak. 180 (1895);
Re Martha A. Hart, 29 N. Dak. 38 (1914).

Ohio.

Although the power to suspend execution of sentences was questioned in the *Drake* case, it was approved in the *Weber* case.

Weber vs. State, 58 O. S. 616 (1898);
Sterling vs. Drake, 29 O. S. 457, 462 (1876);
Bird vs. Cincinnati, 12 W. L. B. 101 (1884);
In re Clara Lee, 3 N. P. n. s. 533 (1905);
Schaefer vs. State, 7 C. C. Rep. n. s. 292 (1905).

Oklahoma.

While sentence need not be passed at the term at which verdict is rendered or plea made, it is held that sentence begins to run on the day it is passed and cannot be suspended by the courts.

Ex parte Clendenning, 22 Okla. 108 (1908);
Ex parte Sparks, Okla. Cr. App. (1913); 132 Pac. 1118.

Pennsylvania.

The practice of suspending imposition of sentence prevails in this state.

Commonwealth vs. Dunleavy, 16 Pa. Super. Ct. Rep. 380 (1901);
Commonwealth vs. Nuber, 6 Pa. Super. Ct. Rep. 420 (1898);
Commonwealth vs. Mayloy, 57 Pa. St. 291 (1868).

South Carolina.

The courts have no power to suspend the execution of sentences. Sentences may, of course, be suspended pending application for pardon.

State vs. Chitty, 1 S. C. (Bailey) 379 (1830);
State vs. Frink, 1 Bay 168 (1791);
State vs. Abbott, 87 S. C. 466 (1911).

Tennessee.

The existence of the power at common law is recognized, but it is held not to exist in Tennessee.

Allen vs. State, Martin & Yerger 294 (1827);
Fults vs. State, 2 Sneed, 232 (1854);
Spencer vs. State, 125 Tenn. 64 (1911);
State vs. Dalton, 109 Tenn. 544 (1902);
McCampbell vs. State, 116 Tenn. 98 (1905);
Crane vs. State, 94 Tenn. 98 (1894);
Allen vs. State, 77 Tenn. 651 (1882).

Texas.

The governor's power of pardon is held to be exclusive and a statute authorizing suspension of sentences was held to be unconstitutional.

Snodgrass vs. State, Tex. Crim. Rep. (1912);
150 S. W., 162.

Utah.

The courts do not have power to suspend imposition of sentences, and by delay lose jurisdiction.

People vs. Blackburn, 6 Utah, 347 (1890);
In re Flint, 25 Utah, 338 (1903);
Reese vs. Olsen, 44 Utah, 318 (1914).

Washington.

The common law power is declared by statute.

State vs. Mallahan, 65 Wash. 287 (1911).

West Virginia.

There are no decisions in point, but the question was discussed in one case in which the governor's power to reprieve was involved.

State vs. Hawk, 47 W. Va. 434 (1900).

Wisconsin.

Courts are without power to suspend execution of sentences.

In re Webb, 89 Wis. 354 (1895).

Canada.

I am informed that there is no case in Canada dealing with this matter. The power to suspend sentence is given by Section 1081 of the Criminal Code.

The practice in Canada has been to suspend the imposition of sentence and to put the defendant under bond to appear for sentence either at a definite time or when called on, and that power has been approved by the statute referred to.

An analysis of these decisions might be made, but it would be of little value. They are not all directly in point, but bear upon the question. Some courts hold a suspension of sentence is void and results in a loss of jurisdiction and others hold it is void, but not affecting the enforcibility of the judgment.

Some decisions support the power to suspend the imposition of sentence, but deny the power to suspend execution.

In some cases the decisions are put on the ground that sentence must go into effect immediately, and the defendant is constructively serving his sentence from the time it is passed. The governor's power of pardon is held by some cases to bar a suspension of sentence.

The point seems clear that extraordinary cases will always occur in which the courts will feel compelled to find a remedy and that it is better to recognize this power than to force the courts to find other means of avoiding injustice.

Any one who has read these decisions must be convinced that in many of the cases in which the power was denied the courts were seeking some means of relieving the defendants from punishment.

Ex parte Bugg, 145 S. W. 831 (Mo. App. 1912), is cited by the government as a case denying the power to capriciously stay the execution of sentence.

The court in that case denied the power to suspend either the imposition or the execution of sentence and held that sentence could only be satisfied by compliance with its terms and never by a mere lapse of time. It held that jurisdiction was not lost by lapse of time. Under such conclusions there would seem to be nothing left but to compel execution of sentence. The circumstances of the case, however, made the enforcement of the sentence unjust and inhuman, so the court held that though delay alone could not relieve the defendant from the consequence of the judgment against him, he must be relieved *if the delay had been so great that society could derive no benefit from the enforcement of the judgment.*

I cannot understand how a court lacking power to do justice or to prevent injustice in the first instance can acquire power by delay.

If the effect on society could be considered after long delay, why not upon conviction?

Perhaps some comment should be made on other cases cited and relied on by the government.

Fuller vs. State, 100 Miss. 811, 57 So. 806 (1912) is quoted from at length in the government's brief. That court upheld the power by its decision of January 15, 1912, (reported in 57 So. 6) and denied it by its decision of March 11, 1912. The court, in its second opinion, said:

> "The inherent powers of a court are such as result from the very nature of its organization, and are essential to its existence and protection, and to the due administration of justice. * * * * It cannot be said that power to suspend the execution of a sentence * * * * is essential to the due administration of justice, and consequently it has no such power."

If the function of the court is to administer justice, or to put it in the negative, so far as this case is concerned, to prevent injustice, why is not the power inherent—essential to the performance of its duties?

The power should only be exercised in the cases in which otherwise injustice will be done and in such cases the power is essential to the administration of justice. If courts are courts of justice, the power must be inherent.

What will the Mississippi court hold when it is called upon to decide a case like *Ex parte Bugg, supra?* Will it also hold that it will not enforce execution of a sentence if there has been long delay and society will not benefit?

In re Webb, 89 Wis. 354 (1895), cited by the government, held the order of suspension void, but it ordered the discharge of the defendant because the term of his imprisonment had expired, though he had not been imprisoned and had consented to the suspension.

If a prisoner escaped, that court would no doubt compel him to serve his sentence if retaken (see *In re Crow,* 60 Wis., p. 370; *State vs. Momsen,* 153 Wis., 203), but under the *Webb* case if a defendant is allowed to avoid imprisonment under a suspended sentence entered with his consent he is technically serving his sentence all the time and must be released. On page 45 of the government's brief the claim is made that whether the order of suspension is valid or void, the defendant may be committed and compelled to serve his sentence, but on that point, of course, the government will not use this Wisconsin case.

Spencer vs. State, 125 Tenn. 64, (1911) is cited by the government, but no mention is made of the fact that this decision upholds the common law power, but finds the power should not be further exercised because the reasons for its exercise at common law no longer exist.

No mention is made of the fact that the quotation from Hale in this report is the same as in the New York case which the government criticizes.

The attention of the court is called to another Tennessee case, *Allen vs. State,* Martin & Yerger, 294 (1827), in which it is held that a convicted person has a *right* to a suspension to enable him to seek a pardon. In *Crane vs. State,* 94 Tenn., 98 (1894), this right was limited to cases in which the court was disposed to recommend a pardon.

People vs. Barrett, 202 Ill. 287 (1903) is also cited by the government. It should be noted that in both the *Barrett* and *Allen* cases in Illinois a long time had elapsed between the date of the suspension of sentence and the second arrest. It was held that by allowing the convicted defendants to go the courts lost jurisdiction.

If the government has a right to have sentence promptly imposed and executed, how can the government be deprived of its right against the defendant by a void act of a court?

The attention of the court is called to the case of *People vs. Mueller,* 4 Crim. Law. Mag. 725, 15 Chi. Leg. News, 364. (1883) which sustains the power.

The court will also notice *People vs. Heise,* 257 Ill. 443. 450 (1913) in which a statute authorizing suspended sentences was held valid and not an invasion of the governor's power of pardon.

If the exercise of the power by the courts is an invasion of the governor's pardon power, can a statute constitutionally confer the power? The Texas courts take the view that it cannot be done. See *Snodgrass vs. State,* 150 S. W. 162 (Tex. Crim. Rep. 1912).

Cases from Michigan are quoted and discussed in the government's brief and it is claimed that Michigan is not one of the jurisdictions upholding the power.

The case of *People vs. Felker*, 61 Mich. 110 (1886) might come under the principles of *Ex parte Lange*, 18 Wall. 163 (1873).

It is true that in *People vs. Cummings*, 88 Mich. 249 (1891) a statute creating a parole board was declared unconstitutional, but in *People vs. Stickle*, 156 Mich. 557 (1909), an act authorizing suspended sentences in cases of wife abandonment was held constitutional, and in *People vs. Dudley*, 173 Mich. 389 (1912) a probation act was held to be constitutional. I quote the following from the Stickle case:

> "The power to suspend sentence and the power to grant reprieves and pardons are distinct and different in origin and in nature. It has never been supposed that the power of courts to suspend sentence was other than a judicial function. It has been frequently and constantly exercised by courts of record before and since the adoption of the Constitution. 4 Hawk. P. C. Chap. 51; § 8; 1 Bishop on Criminal Procedure, (2nd Ed.) § 1124; 4 Blackstone's Commentaries, chap. 31, *Commonwealth vs. Dowdican*, 115 Mass. 136; *Weaver vs. People*, 33 Mich. 296; *People vs. Reilly*, 53 Mich. 260; *People ex rel Forsythe vs. Court of Sessions*, 141 N. Y. 288. Assuming the power to be, as it was at common law asserted to be, a power inherent in courts, no new power is conferred upon courts when the legislature in terms authorizes courts to suspend sentence."

United States District Judge Tuttle of Detroit has advised respondent by letter:

> "The practice in this State is to suspend sentence indefinitely. Many of our Circuit Judges suspend sentences from term to term, for a time requiring the party to appear before them and report as to his conduct and then when they are satisfied with his behavior, and his promises for the future, they indefinitely suspend the sentence."

The Assistant Attorney General of Michigan has advised that the power exists and is exercised in Michigan.

Neal vs. State, 104 Ga. 509 (1898) is cited and quoted from in the government's brief, but the court should note that the Georgia cases sustain the power to suspend imposition of sentence though they deny the power to suspend execution. I cannot understand the difference in principle. The same result is intended and accomplished. If the government has the right to have sentence executed, it must have the right to have it imposed.

The government evidently is misinformed as to the law and practice in Ohio. The case of *Weber vs. State*, 58 O. S. 616 (1898) has been consistently followed by the lower courts.

The case of *State vs. Baker*, 3 Ohio N. P. n. s. 622, 624 (1905) referred to by the government on page forty-three of its brief did not involve the question presented here. In that case a person had been convicted and sentenced and then applied for a suspension of sentence and for an order admitting him to bail to enable him to prosecute error proceedings. The Common Pleas Court, considering §§13698 and 13757 of the General Code of Ohio, held it had power to suspend execution of sentence, but no power to admit to bail until after the petition in error was filed. It is submitted that the court failed to properly construe the statutes and overlooked its common law power. The power to suspend temporarily and to admit to bail to give effect to the suspension is nowhere denied and was clearly exercised at common law. That Common Pleas decision resembles somewhat the Indiana decision, *Butler vs. State*, 97 Ind. 373 (1884), which held that the courts had no power to suspend a death sentence pending an appeal. The convict had the right to appeal, but might be executed under the judgment while it was being reviewed. The *Baker* case is not in accord with the common practice in Ohio.

There is no mention in the government's brief of the probation legislation in Ohio to be found in §§ 13706 *et seq.* of the General Code, which provides for suspension of sentences. In actual practice in Ohio, some sentences are sus-

pended under the probation statutes and some by virtue of the common law power of the courts.

The statute in Ohio with respect to the testimony of accomplices throws some light on the situation.

The Constitutions of Ohio, of 1802, 1851 and 1913, have all provided that the governor should have power to grant reprieves and pardons after conviction.

A Code of Criminal Procedure was adopted in Ohio, May 6, 1869, which provided:

> "SEC. 146. When two or more persons shall be indicted together, the court may, at any time before the defendant has gone into his defense, direct any one of the defendants to be discharged, that he may be a witness for the state. An accused party may, also, when there is not sufficient evidence to put him upon his defense, be discharged by the court; or if not discharged by the court, shall be entitled to the immediate verdict of the jury, for the purpose of giving evidence for others accused with him; such order of discharge in either case shall be a bar to another prosecution for the same offense." (66 Ohio Laws, 287).

This act has been in force since its passage and is now to be found in Section 13670 of the General Code.*

If the governor's power of pardon is exclusive, as claimed by the government in this case, it would seem that this act is clearly unconstitutional, although it might be classed as an act of general amnesty and come under the decision in *Brown vs. Walker*, 161 U. S., 591 (1896); which holds that the President's power of pardon does not take from Congress the power to pass acts of general amnesty.

I believe the people of Ohio—at least in Toledo—would be shocked by the execution of a sentence of five years in a case like the one under consideration, and the court will note the names of prominent men in Toledo who have recommended suspension of sentence and pardon in this case. (Respondent's Answer, page 15.)

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*A statute and constitutional provision in substantially the same words is in force in Missouri in which the power now in question is

In considering this question now before the court I claim the benefit of the decisions sustaining the power to suspend the imposition of sentences as well as those upholding the power to suspend execution of sentences. The difference in method cannot affect the power. Hale, Hawkins and Blackstone state that the power may be exercised after as well as before judgment.

See also:

People vs. Goodrich, 149 N. Y. Supp. 406 (1914).

I do not believe it is necessary to quote at length from the authorities. The following, among others, sustain respondent's views:

Commonwealth vs. Dowdican's Bail, 115 Mass 133 (1874);

Gehrmann vs. Osborne, 79 N. J. Eq. 430 (1912);

People ex rel. vs. Court of Sessions, 141 N. Y. 288 (1894);

People vs. Goodrich, 149 N. Y. Supp., 406 (1914);

State vs. Crook, 115 N. C., 760 (1894);

Weber vs. State, 58 O. S., 616 (1898);

Commonwealth vs. Dunleavy, 16 Pa. Super. Ct. Rep., 380 (1901);

State ex rel. vs. Drew, 75 N. H., 402 (1909);

Regina vs. Ryan, 7 Cox Crim. Cas., 109 (1855);

Queen vs. Richardson, 8 Dowling's Prac. Cas., 511 (1840).

There are but few cases in this court and in our Federal courts bearing on the questions involved in this case, and this may be as appropriate a place as any to refer to them.

In *United States vs. Pile,* 130 U. S., 280 (1889), it was held by this court that by an order suspending execution of a judgment a court does not retain jurisdiction to vacate the judgment after the term.

In *Pointer vs. United States,* 151 U. S., 396, 419 (1894), this court declined to pass upon the question involved in this case.

In *Ex parte Wells,* 18 How., 307 (1855), the court discussed the President's power to pardon and reprieve and expressed views which have a rather important bearing on this case. Mr. Justice Wayne said the power should be exercised.

> "* * * particularly when the circumstances of any case disclosed such uncertainties as made it doubtful if there should have been a conviction of the criminal, or when they are such as to show that there might be a mitigation of the punishment without lessening the obligation of vindicatory justice. Without such a power of clemency, to be exercised by some department or functionary of a government, it would be most imperfect and deficient in its political morality, and in that attribute of deity whose judgments are always tempered with mercy."
>
> * * * * *
>
> "At the time of the adoption of the constitution American statesmen were conversant with the laws of England, and familiar with the prerogatives exercised by the crown. Hence, when the words to grant pardons were used in the constitution, they conveyed to the mind the authority as exercised by the English crown, or by its representatives in the colonies. At that time both Englishmen and Americans attached the same meaning to the word pardon. In the convention which framed the constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment.
>
> "We must then give the word the same meaning as prevailed here and in England at the time it found a place in the constitution. This is in conformity with the principles laid down by this court in *Cathcart vs. Robinson,* 5 Pet., 264, 280; and in Flavell's case, 8 Watts & Sargent, 197; Attorney-General's brief."
>
> "There are also pardons grantable as of common right, without any exercise of the king's discretion; as

where a statute creating an offense, or enacting penalties for its future punishment, holds out a promise of immunity to accomplices to aid in the conviction of their associates. When accomplices do so voluntarily, they have a right absolutely to a pardon, 1 Chit. C. L., 766. Also, when, by the king's proclamation, they are promised immunity on discovering their accomplices and are the means of convicting them. *Rudd's* case, Cowp., 334; 1 Leach, 118. But except in these cases, accomplices, though admitted according to the usual phrase to be 'king's evidence,' have no absolute claim or legal right to a pardon. But they have an equitable claim to a pardon, if upon the trial a full and fair disclosure of the joint guilt of one of them and his associates is made. He cannot plead it in bar of an indictment for such offense, but he may use it to put off the trial, in order to give him time to apply for a pardon. (Rudd's case, Cowp., 331; 1 Leach, 115.)"

Speaking of the President's power to reprieve, as distinguished from his power to pardon, Justice Wayne said:

"A single remark from the power to grant reprieves will illustrate the point. That is not only to be used to delay a judicial sentence when the President shall think the merits of the case, or some cause connected with the offender, may require it, but it extends also to cases *ex necessitate legis*, as where a female after conviction is found to be *enceinte*, or where a convict becomes insane, or is alleged to be so. Though the reprieve in either case produces delay in the execution of a sentence, the means to be used, to determine either of the two just mentioned, are clearly within the President's power to direct; and reprieves in such cases are different in their legal character, and different as to the causes which may induce the exercise of the power to reprieve."

In *United States vs Wilson*, 7 Peters 150, 160 (1833), Chief Justice Marshall had this to say concerning pardons:

"The constitution gives to the president, in general terms, 'the power to grant reprieves and pardons for offenses against the United States.'

As this power had been exercised from time immemorial by the executive of that nation whose lan-

guage is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.

A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court."

In the *Whisky Cases*, 99 U. S., 594 (1879), it was held a promise of immunity to an accomplice could not be pleaded in bar, but could only be used to delay prosecution. The opinion by Justice Clifford goes into the history of this phase of the law, but indicates that courts will not permit injustice to be done even a confessed accomplice.

In *Nobles vs. State of Georgia*, 168 U. S., 398 (1897), the court discusses a suspension of sentence to inquire into the sanity of the convict, and holds he is not entitled to a jury.

The Federal cases bearing directly on the question involved in this case are:

United States vs. Wilson, 46 Fed., 748 (1891);
In re James Allen, unreported; (U. S. Dist. Ct., Dist. of Kan., 1st Div., Pollock, J.);
In re Carl Leopold, unreported; (Dist. Ct., Chaves Co., New Mex. Terr. 1909, Pope, J.);
United States vs. Blaisdell, 3 Benedict, 132 (1869);
United States vs. Gilbert, Fed. Cas. No. 15205 (1873).

In the last case, District Judge Sherman said:

> "The motion for a new trial is therefore overruled, and the defendant sentenced to pay a fine of five hundred dollars, and the costs of this prosecution, and to be imprisoned for six months; but under the advice and concurrence of the post-office department, and under all the circumstances of this case, the execution of the sentence as to imprisonment is indefinitely suspended."

In *United States vs. Blaisdell*, 3 Benedict, 132 (1869), the defendants were convicted of violating the internal revenue law and moved the court to delay judgment on the ground that the government, in consideration of disclosures of frauds, had promised immunity.

Judge Blatchford held he would not delay sentence and defendants must look to the executive to carry out the pledges of protection.

The court then sentenced the defendants under one count and suspended sentence under the other counts until after the execution of that sentence.

In *United States vs. Gibert*, 2 Sumner, 19, Fed. Cas. No. 15204 (1834), Judge Story touched upon the power of common law courts to reprieve.

See:

United States vs. Lambert, 2 Cranch, C. C. 137, Fed. Cas. No. 15554 (1817);
United States vs. Jennegen, 4 Cranch, C. C. 118, Fed. Cas. No. 15474 (1830).

We come now to a general discussion of the reasons for the existence and exercise of this power.

The government insists that the objections to the practice are elementary, but leaving out of consideration the acquiescence of the government in the continued exercise of this power, and the fact that judges of the highest standing dis-

agree with the government, it will be difficult to convince me that a young man like Henahan should go to prison to satisfy society's craving for vengeance—to vindicate the law.

If Henahan had stolen a cent, he would have been guilty, just as guilty, so far as concerns the infraction of the law, as if he had stolen a hundred thousand dollars.

If he was guilty, the minimum sentence was five years in the penitentiary. It is no answer to say that the government would not indict a man who had only stolen a cent. If the law *must* be vindicated, every violation of the law must be prosecuted to a conviction and sentence, and every sentence must be executed. There can be no escape from that obligation by any government or court officials, whether grand juries, marshals, district attorneys, or courts. If the courts are not to be trusted with any discretion, there certainly can be none left in the district attorneys.

If this view of the government is correct, then the exercise by district attorneys of the power to *nolle* indictments must be questionable, for we should be obliged to try the question of guilt in all cases and not let it be disposed of by a *nolle* by a district attorney.

Personally, I do not believe, judges are so powerless to humanize the law in the extraordinary cases.

At this point, let the government say what sentence should have been imposed in this case. There were two distinct offenses charged in the indictment. The penalty was not less than five years imprisonment for each offense. If Henahan should suffer the statutory penalty for each offense, upon what authority could a sentence for but five years be based? How will the government explain the unquestioned power of the court to impose sentences to be executed concurrently and thus practically relieve certain convicts from one or more of the penalties provided by law?

It will, no doubt, be claimed that the common law power was limited to reprieves for definite periods and that the

common law authorities do not justify the existence of the power as exercised by respondent.

It is submitted that if only a limited power existed at common law, our social conditions have so changed as to justify and require the exercise of a broad power, and that by reason of such change our courts have properly expanded or modified the law to fit the new situation.

This claim will, of course, be met with the assertion, that the change of conditions makes it unnecessary to exercise the power.

It is true judgments of conviction may be reviewed, bail is required to be accepted, defendants may be heard by counsel, and may testify and offer testimony of others in defense, and that in many respects our criminal laws are not so harsh and rigid as they were in the time of Hale, Hawkins or Blackstone, but, on the other hand, our people are more enlightened and our views as to punishment are different.

Criminals are not punished in this day that they may suffer, nor that the law may be vindicated, nor that the state may have vengeance, but only for the good of society.

I am not equipped to discuss the *rationale* of punishment and must pass the point with the suggestion that our people would look with horror upon a court of justice that, in the circumstances of this case, would send a young man to the penitentiary for five or ten years and ruin him and his family.

It may be that the certainty of punishment is necessary to restrain possible wrong-doers, but until our penal laws are so framed that the courts can measure punishment to the circumstances of each case and the peculiarities of individuals, the power in question should exist and be exercised to the end that injustice may not be done in the extraordinary cases.

I am informed that in England there are no minimum punishments and the court in which a conviction is had may measure the punishment according to the circumstances.

See:

Kenny—Outlines of Criminal Law, page 485.

There will be no necessity for the exercise of this power when our penal laws provide no minimum penalties.

This is illustrated by the case of *People vs. Blackburn*, 6 Utah, 347 (1890), in which a writ of mandamus was sought to compel a judge to impose a sentence. The court held against the power to suspend sentence but refused the writ prayed for because the statute fixed no minimum penalty, and the judge might impose a nominal penalty.

Some State courts hold that though this power existed at common law, it is inconsistent with our institutions and was never adopted as a part of our law.

This is suggested on page 44 of the government's brief, in the following:

> "Of course it goes without saying that, though in England, where there was no division of the government into branches, the court might act as the representative of the King, they may not in this country discharge functions exclusively confided to the executive branch of the Government."

I submit the power in question was always judicial and was not a delegated regal power.

I have not been able to find anything to indicate that this power was ever delegated by the Kings of England to the judges.

Some time prior to the Conquest the Kings did not claim the prerogative of administering justice, or of being the fountain of justice. There is nothing to show that after they claimed the judicial prerogative, they delegated this power in any commissions to their justices. I think it is more likely this power in some form was exercised by our tribunals even in their crudest form, and that it was never taken away after the power of administering justice was claimed by the Kings.

However this may be, the power seems to have been vested in the courts when we adopted the common law, and, by the use of the word "court," in its common law meaning, in our Constitution and statutes, this power was continued in our courts.

In this connection consideration should be given to the results that will follow if this power be denied.

Our district attorneys may then indict as they please, *nolle* the cases they see fit, and control absolutely the whole prosecution. Our courts may then rule on evidence offered and instruct the juries on the law and keep order in the court rooms, but in case of plea of guilty or conviction, must assess the penalties fixed by statute in all cases. If an outrageous minimum penalty is provided, it must be imposed without regard to circumstances.

The weak-minded must suffer equally with the vicious, and technical guilt may compel the imposition of penalties that will be shocking, and trivial offenses may be followed by cruel and oppressive minimum punishments.

Self-respecting judges might well retire rather than become instruments of oppression and injustice.

On this point I mention the practical difficulty of obtaining a pardon, particularly by those who are unfortunate enough to be poor and ignorant and without influential friends.

Of course, it will be suggested that the remedy is to be sought from Congress, but the court will not overlook the great number who must suffer to attract the attention of Congress, and after notice of the situation has been taken, what statute can be drawn to take care of all the extraordinary cases that will arise? Besides, if this discretion is denied the courts because its exercise invades the prerogative of the executive, how can Congress constitutionally legislate it into the courts?

The power of our courts to prevent injustice has in my opinion become greater rather than less, and I submit it is within the power of a court to suspend the execution of a sentence which, as Chitty says, is inconsistent with humanity or justice.

This power is, it seems, more essential to the administration of justice than it was before we adopted the common law, and conditions are now such as to require the existence of a broad power, whether it existed at common law or not.

Our criminal law is constantly developing.

Sir James Stephen, in the preface to his *History of the Criminal Law of England*, says:

> "It has been a matter of unceasing interest to see how the crude, imperfect definitions of the thirteenth century were gradually moulded into the most complete and comprehensive body of criminal law in the world, and how the clumsy institutions of the thirteenth century gradually grew into a body of courts and a course of procedure which, in an age when everything is changed, have remained substantially unaltered, and are not alleged to require alterations in their main features."

In considering the development of our criminal law, it should be remembered that anciently insanity was not a defense, but a special verdict might be rendered that the offense was committed when insane and the right to a pardon followed.

One charged with homicide could not be acquitted by proving the killing to be accidental or in self-defense. Such a person must be found guilty, but was entitled as of right to a pardon.

It is no greater development of the law to say that, in the few extraordinary cases that occur, the courts have power to indefinitely suspend sentence.

The power of courts to admit to bail after conviction has been amplified and enlarged so that now there is little

question as to the propriety of its exercise, and in this connection it might be noted that there are no inflexible rules controlling the exercise of that power, which is to be used with great caution and only when circumstances make it proper. I have not found any complaint against the capricious exercise of the power to admit to bail, though the circumstances controlling its exercise are in many respects the same as those controlling the exercise of the power to suspend sentence.

The respondent shows in his answer (pages 4 *et seq.*) some facts tending to establish the continuous exercise of this power by our judges. If there has been a continuous exercise of the power, what is the effect? If this practice has been common; if it has developed into a custom; if the custom has been common and continuous, has it not become a part of our law?

Have we lost our power to make law by developing custom?

Lord Bryce, in his essay on Roman and English legislation, says our people may make law directly by observing certain usages till these grow so constant, definite and certain that everybody counts on them, assumes their existence, and feels sure that they will be recognized and enforced.

Again, in the same essay, he says:

> "That theory is that the judges of the Common Law Courts are nothing more and nothing less than the officers who expound and apply the Common Law, a body of usages held to be known to the people and by which the people live, usages which existed, in their rudimentary state, as far back as our knowledge extends, most of which have not been formally embodied in any legislative act, but which have been always recognized as binding. Such customary rules are not law because they are declared to be so by the judges; on the contrary the judges enforce them because already, antecedently to their decision, binding law."

See also *Pollock's note "D" to Maine's Ancient Law.*

"But English judges are bound to give their decisions in conformity with the settled general principles of English law, with any express legislation applicable to the matter in hand, and with the authority of their predecessors and their own former decisions. At the same time they are bound to find a decision for every case, however novel it may be; and that decision will be authority for other like cases in future; therefore it is part of their duty to lay down new rules if required. Perhaps this is really the first and greatest rule of our customary law; that, failing a specific rule already ascertained and fitting the case in hand, the King's judges must find and apply the most reasonable rule they can, so that it be not inconsistent with any established principle. They not only may but must develop the law in every direction except that of contradicting rules which authority has once fixed. Whoever denies this must deny that novel combinations of facts are brought before the courts from time to time, which is a truth vouched by common experience and recognized in the forensic phrase describing such cases as 'of the first impression;' or else he must refuse to accept the principle that the court is bound to find a decision for every case, however novel. It is true that at many times the courts have been over-anxious to avoid the appearance of novelty; and the shifts to which they resorted to avoid it have encumbered the common law with several of the fictions which Maine denounces (p. 27) as almost hopeless obstacles to an orderly distribution of its contents."

See:

Bechuanaland Exploration Co. vs. London Trading Bank, 2 Q. B. (1898) 658.

If the power was not in fact exercised at Common Law to the extent now claimed, what is the result of the common and continuous exercise of the power by our judges?

It seems clear that in States in which courts have common law powers, the development or amplification of the common law may enlarge the powers of a court.

In the case of a court whose common law powers (using the expression for convenience), are only such as are necessarily implied from statute, it would seem that the effect of the continuous exercise of a power in a certain way must result in a construction of the statute admitting the exercise of the power.

Considering further the results, if this power be denied, it seems proper to mention the use made of this power in the past by the Department of Justice, to secure convictions.

It has been used frequently and with great effect in cases of accomplices.

The Department has frequently arranged for the suspension of imposition of sentence against one of two or more co-defendants so as to keep him available as a witness. It has been found that better results have attended this practice than the practice of making bargains between criminals and the department.

It must be borne in mind that the denial of this power will result in hardship upon the poor and ignorant classes of defendants in criminal cases, and upon the very old, very young and the sick.

It seems to me the strongest argument against the exercise of this power is that it will destroy all the elasticity in the execution of our criminal laws.

If this power is to be denied, it must follow that district attorneys must be denied the power to *nolle* indictments.

If the sole function of the court is to determine the fact of guilt, a district attorney cannot be allowed to usurp that function by entering a *nolle* in any case which he thinks cannot be successfully prosecuted or which he thinks does not justify punishment.

If the government has the right to have the guilty punished, it has the right to have the accused tried, lest some guilty ones escape.

In this connection, also, where do Federal courts obtain the power to permit a *nolle* to be entered? There is no Federal statute on the subject yet the exercise of the power is not open to question.

2. This Power is One of the Implied Powers of our Federal Courts.

The judicial powers of the Federal district courts and of the judges thereof must, of course, be traced to acts of Congress passed pursuant to the Constitution and are such as are expressly granted or conferred by necessary implication.

It is submitted that the word "courts" in the Constitution and statutes was used in its common-law meaning, and, if courts at common law had this power, then, it follows that our Federal courts have it unless an intention to exclude it clearly appears.

This view seems to be consistent with §722 R. S.

The government insists that statutes of the United States exclude the power, claiming they are suitable to accomplish the prosecution and punishment, but the common-law power in question goes to both the punishment and the power to determine when the law applies.

In Ohio an act for the relief of persons imprisoned for failure to pay fines was held to be constitutional on the ground that it was a modification of penalties rather than an exercise of the pardoning power.

Ex parte Scott, 19 O. S., 581 (1869).

It is submitted that by reason of the common law (perhaps as modified) an exception is provided to all our statutes imposing penalties for crimes, and our courts, by necessary implication, are authorized to determine what cases come within the exception.

It may not be an inherent power, that is, it may be possible to organize courts and compel them to adhere to statutory penalties, but, being one of the powers making up a common-law court, it became by necessary implication one of the powers of our Federal district courts.

See:

Howard vs. United States, 75 Fed., 986, 990 (1896);
In re Henry, 123 U. S., 372 (1887).

Our Federal courts frequently impose sentences to run concurrently, in fact where two or more sentences are imposed at the same time, they run concurrently and not cumulatively, unless there is a clear direction that they shall be cumulative.

See:

United States vs. Patterson, 29 Fed., 775 (1887);
Kirkman vs. McClaughry, 152 Fed., 255 (1907);
Ex parte Peake, 144 Fed., 1016 (1906).

The government denies the power in this case on the ground that the statutes are suitable for the punishment of convicts and the power in question works toward the avoidance of punishment.

If the letter of the statutes must be followed, a penalty must be suffered for each offense and, to be consistent, the government must deny the propriety of concurrent sentences.

Henahan committed two distinct offenses, the penalty for each being five years' imprisonment. If the statutes are to be strictly followed, his sentence should have been ten years' imprisonment.

It is submitted that in the absence of a statute clearly denying the power, our Federal courts have the common-law power to suspend execution of sentences.

The courts claim the power to impose concurrent or cumulative sentences because courts at common law had that power. If that is the reason, then why may not courts also exercise the common law power of suspending sentences? If the power to impose concurrent sentences is one of the implied powers of Federal courts, implied because the power was exercised at common law, then why is not the common law power in question to be implied?

It might be noted at this point that §31 of the Act of April 30, 1790, reads:

> "And be it further enacted that the benefit of clergy shall not be used or allowed, upon conviction of any crime, for which by any statute of the United States, the punishment is, or shall be declared to be, death."

It would seem that §31 was adopted for the reason that in its absence the common law power of allowing benefit of clergy would exist and might be exercised.

It appears that in the District of Columbia in 1817, benefit of clergy was allowed.

In *United States vs. Lambert*, 2 Cranch C. C., 137, Fed. Cases No. 15,554 (1817) the following appears:

> "Verdict, guilty—recommended to mercy by the jury. The court decided that he was entitled to the benefit of clergy and sentenced him to be burnt in the hand, and to recognize in 500 dollars for his good behavior for one year, and to stand committed till the costs should be paid."

The court must have understood it had the right to exercise some common law powers.

Quaere. Does the repeal of the Act of April 30, 1790, by the Act of March 4, 1909, have the effect of restoring the plea for benefit of clergy?

In the absence of an Act of Congress, the courts of the United States are governed by the rules of the common law in the administration of the criminal law.

See:

Howard vs. United States, 75 Fed., 986, 990 (1896);
United States vs. Nye, 4 Fed., 888 (1880);
Erwin vs. United States, 37 Fed., 470, 488 (1889);
United States vs. Maxwell, 3 Dill., 275, 278 (1875).

If the courts may look to the common law for their power to impose cumulative sentences, or sentences which run concurrently, or sentences which commence in the future, or to permit cases to be disposed of by *nolle*, why may not the same common law give the power to suspend sentence in the few extraordinary cases in which injustice would otherwise result?

3. By the Continuous Exercise of the Power, the Statutes Creating and Defining the Powers of Our Federal Courts and Those Prescribing Penalties for Crimes Have Been Construed in Practice to Admit the Exercise of This Power.

The statutes creating our district courts and those fixing the penalties for crimes have been construed in the practice of the last century or so to admit the existence and exercise of the power to suspend sentences indefinitely. As shown in respondent's answer, many judges of the highest standing have exercised the power and, of course, the Department of Justice has been cognizant of the practice.

Is it not too late to complain, and must not the government seek the aid of Congress if the practice is not satisfactory?

It may be that in practice there has been a development, expansion or amplification of the common law—that the common-law power has been extended from the power to grant

temporary or definite reprieves to the power to indefinitely suspend sentences in one form or another, but I know of no reason why the construction of statutes may not be modified by practice. If practice can fasten a construction upon statutes, it can certainly modify that construction.

It is not admitted that there has been any change in the common law or in the practice of the courts or in the construction given to the statutes creating our inferior Federal courts or fixing penalties for crimes, but it is submitted that the exercise of the power as claimed by respondent is justified by practice, even though the power did not exist at common law.

This court has sustained judicial powers in several instances because of settled practice.

In *Stuart vs. Laird*, 1 Cranch, 299, (1803), the court upheld the right of a justice of the Supreme Court to sit as a circuit judge. The court said:

> "Another reason for reversal is, that the judges of the supreme court have no right to sit as circuit judges, not being appointed as such, or in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed."

In *McKeen vs. Delancy's Lessee*, 5 Cranch, 22 (1809) this court upheld the practice of acknowledging deeds before a justice of the Supreme Court of Pennsylvania, though the statute required acknowledgment before a justice of the peace. Chief Justice Marshall said that if the act was under

construction for the first time, it would be obliged to hold a justice of the Supreme Court could not be deemed a justice of the peace, and he then continued:

> "But, in construing the statutes of a State, on which land titles depend, infinite mischief would ensue, should this court observe a different rule from that which has been long established in the State; and in this case, the court cannot doubt that the courts of Pennsylvania consider a justice of the Supreme Court as within the description of the act.
>
> "It is of some weight that this deed was acknowledged by the chief justice, who certainly must have been acquainted with the construction given to the act, and that the acknowledgment was taken before another judge of the supreme court."

In *Martin vs. Hunter's Lessee*, 1 Wheat., 304, 352 (1816), the appellate power of this court was in question. This court said:

> "This weight of contemporaneous exposition by all parties, this acquiescence of enlightened state courts, and these judicial decisions of the supreme court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremediable doubts."

In *Cohens vs. Virginia*, 6 Wheat, 264, 420 (1821), this court said:

> "While on this part of the argument, it may be also material to observe that the uniform decisions of this court on the point now under consideration, have been assented to, with a single exception, by the courts of every State in the Union whose judgments have been revised. It has been the unwelcome duty of this tribunal to reverse the judgments of many state courts in cases in which the strongest state feelings were engaged. Judges, whose talents and character would grace any bench, to whom a disposition to submit to jurisdiction that is usurped, or to surrender their legitimate powers, will certainly not be imputed, have

yielded without hesitation to the authority by which their judgments were reversed, while they, perhaps, disapproved the judgment of reversal.

"This concurrence of statesmen, of legislators, and of judges, in the same construction of the constitution, may justly inspire some confidence in that construction."

In *Tayloe vs. Thomson's Lessee*, 5 Peters, 358, 368 (1831), this court held that an act which by its terms applied only to British merchants, had been construed in practice to apply to all judgment creditors. This court said:

> "It is enough for this court to know, that by ancient, well established, and uniform usage, it has been acted on and considered as extending to all judgments in favour of any persons; and that sales under them have always been held and respected as valid titles. The circuit court were right in deciding that the plaintiff below was entitled to all the benefits of the statute of 5 Geo. II. Though it does not provide a judgment shall be a lien from the time of its rendition; yet there is abundant evidence that it has always been so considered, and so acted on."

In *New Jersey Steam Navigation Co. vs. Merchants' Bank*, 6 How., 344, 385 (1848), this court sustained the jurisdiction of Federal courts in admiralty by a practical construction of the Judiciary Act.

See also:

Fairbank vs. United States, 181 U. S., 283, 307 (1901);

The Laura, 114 U. S., 411 (1885);

Bank of United States vs. Halstead, 10 Wheat., 51, 62 (1825);

Atkins vs. Fiber Disintegrating Co., 18 Wall., 272 (1873).

The government claims that Congress has not recognized this power, but it is submitted that Congress must have known of the practice and must have acquiesced in the practical con-

struction thereby fixed upon the statutes creating and defining the jurisdiction of Federal courts. I find two instances in which the practice must have been directly before Congress.

In the second session of the Sixty-Third Congress a bill was introduced in the House to codify, revise, and amend the laws relating to the judiciary (H. R. 15578) which provided in §269 that a person sentenced to imprisonment, either in a jail or penitentiary, should be ordered by the court into the custody of the marshal. The bill was amended in the House of Representatives and appeared in the Senate reading thus:

> "A person sentenced to imprisonment either in a jail or penitentiary, unless the execution of the sentence be suspended, shall be ordered by the court into the custody of the marshal."

The bill was not passed, but it is entitled to some consideration as a recognition of the practice by Congress.

Attention is also called to Chap. 50, §2, of the Act of February, 13, 1913, relating to larcency of goods in inter-state commerce, which provides:

> "That nothing in this Act shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof; and a judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts."

Does this Act recognize the State practice? Suppose Henahan had been convicted in the State courts of New York for larcency of goods in inter-state commerce and imposition of sentence had been suspended; or suppose the conviction had been in Ohio and execution of sentence had been suspended; could the government force the punishment of the offender by a prosecution under the Act of February 13, 1913?

It is submitted, then, that our Federal courts have and may exercise this power because it existed at common law and was added to their statutory powers by necessary implication, and it is also claimed that by reason of the practical con-

struction given to our statutes, our courts have the right to exercise the power now drawn in question.

4. The Exercise of This Power is Not an Invasion of the Pardoning Power.*

Is a suspended sentence the equivalent of a pardon, since it does not relieve the convict from the civil disabilities resulting from conviction?

The claim of the government is that under our scheme of government the pardoning power, which includes reprieve and commutation, is an exclusive function of the executive branch, not to be enjoyed by the judiciary.

I take it that if the courts exercised this power at common law, the result was necessarily a limitation of the King's power to pardon or reprieve, that is, the King's power in this respect was not exclusive.

In *Ex parte Wells*, 18 How., 307 (1855), Mr. Justice Wayne said:

> "At the time of the adoption of the constitution American statesmen were conversant with the laws of England, and familiar with the prerogatives exercised by the crown. Hence, when the words to grant pardons were used in the constitution, they conveyed to the mind the authority as exercised by the English crown, or by its representatives in the colonies. At that time both Englishmen and Americans attached the same meaning to the word pardon. In the convention which framed the constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment.
>
> "We must then give the word the same meaning as prevailed here and in England at the time it found a place in the constitution."

See also:

> United States vs. Wilson, 7 Peters, 150, 160 (1833).

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* The attention of the court is called to an article entitled, **"Executive, Legislative and Judiciary in Pardon,"** by Prof. James D. Barnett of the University of Oregon, in Vol. XLIX, American Law Review, page 684, particularly pages 705 et seq.

The civil disabilities of a convict are not removed by a suspension of execution of sentence and in this respect it differs from a pardon.

In *People ex rel. vs. Court of Sessions*, 141 N. Y., 288 (1894), the New York Court of Appeals said:

> "The power to suspend sentence and the power to grant reprieves and pardons, as understood when the Constitution was adopted, are totally distinct and different in their origin and nature. The former was always a part of the judicial power. The latter was always a part of the executive power. The suspension of the sentence simply postpones the judgment of the court temporarily or indefinitely, but the conviction and liability following it, and all civil disabilities, remain and become operative when judgment is rendered. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender."

In *People vs. Stickle*, 156 Mich., 557 (1909), the Supreme Court of Michigan quotes with approval from the New York decision, and says:

> "A question presented in argument, one not raised in the court below, relates to the effect to be given to the proviso to section one. The point is considered for the reason heretofore given. The pardoning power belongs to the executive. If the effect of the proviso is to distribute any part of the pardoning power to another department of government, the legislation is invalid. If it is invalid, we shall be obliged to determine whether the act without the proviso may be sustained. The power to suspend sentence and the power to grant reprieves and pardons are distinct and different in origin and in nature. It has never been supposed that the power of courts to suspend sentence was other than a judicial function. It has been frequently and constantly exercised by courts of record before and since the adoption of the Constitution, 4 Hawk. P. C. chap. 51, §8; 1 Bishop on Criminal Procedure (2d. Ed.) §1124; 4 Blackstone's Commentaries, chap. 31; *Commonwealth vs. Dowdican*, 115 Mass., 136; *Weaver vs. People*, 33 Mich., 296; *People vs. Reilly*, 53 Mich 260; *People ex rel. Forsyth vs. Court of Sessions*, 141 N.

Y., 288. Assuming the power to be, as it was at common law asserted to be, a power inherent in courts, no new power is conferred upon courts when the legislature in terms authorizes courts to suspend sentence. The distinction between the pardoning power and the power to suspend sentence is clearly pointed out in the opinion in *People ex rel. Forsyth vs. Court of Sessions, supra.*"

See:

Spencer vs. State, 125 Tenn., 64, at p. 69 (1911);

State vs. Addy, 43 N. J. L., 113 (1881).

It has been held that the President's power of pardon does not deprive Congress of power to pass acts of general amnesty.

Brown vs. Walker, 161 U. S., 591 (1896).

In this connection, it is proper to call the attention of the court to the conflict of authority as to the constitutionality of statutes authorizing the suspension of sentences. The courts of New York, Michigan, Illinois, Washington, Missouri, California and New Mexico, sustain the statutes, while the decisions in North Dakota and Texas are adverse.

See:

People vs. Heise, 257 Ill., 443, 450 (1913);

People ex rel. vs. Court of Sessions, 141 N. Y., 288 (1894);

People vs. Stickle, 156 Mich., 557 (1909);

Re Martha A. Hart, 29 N. Dak., 38 (1914);

Snodgrass vs. State, Tex. Crim. Rep. (1912), 150 S. W., 162;

Commonwealth vs. Halloway, 42 Pa. St., 446 (1862);

Ex parte Bates, N. Mex. (1915), 151 Pac. 698;

Ex parte Parker, 106 Mo. 551 (1897);

State vs. Mallahan, 65 Wash. 287 (1911);

In re Giannini, 18 Cal. App. 166 (1912).

The government declines to concede the constitutionality of such legislation (Brief, pages 9, 10), but it seems clear that such legislation, as well as §§ 1042 and 5296 R. S. relating to remission of fines, comes within the decision of this court in *Brown vs. Walker, supra,* and does not invade the President's power of pardon.

It would seem that both the power of the executive to pardon and the judicial power to suspend sentences are directed to the same end, and since they have both been in existence for centuries and the courts and executives have seldom been in conflict in their exercise, there is no reason to anticipate any danger from continuing both powers.

There is but one case in the books in which it appears than an executive objected to the exercise of this power by the courts and that was a reprieve of execution of a death sentence for only twenty days. Miller's case, 9 Cowen, 730 (1828).

I submit the two are not inconsistent; that they are not equivalents and the power of the executive is not exclusive.

I think there can be no doubt that the courts have exercised this power for a long time with the acquiescence of the Presidents.

Of course, the Department of Justice has known of the practice through the district attorneys and clerks and, in fact, the Department has requested courts to suspend sentences. In two cases before Judge Swan at Detroit, the record shows:

> "On motion of the District Attorney, Attorney General approving, sentence suspended indefinitely."
>
> United States vs. Fields, No. 5069, February 28, 1909;
>
> United States vs. Forsythe, No. 5071, Feb. 28, 1909.

It might be noted those were cases of embezzlement, taking money order funds and letters from the post office under §§4046 and 5069, R. S.

It may be that in those cases there were mitigating circumstances as in this case, and restitution having been made, the government did not feel that the safety of society required punishment.

In *United States vs. Phillips*, 6 Peters, 776 (1832), it appears that after the case was in this court a *nolle* was entered by the Attorney General by the direction of the President.

The government in the past has recommended and obtained suspended sentences in order to benefit by the assistance and testimony of accomplices.

If this is a correct statement of the practice, has it not been determined in actual practice that one power does not conflict with the other?

The case of *The Laura*, 114 U. S., 411 (1885), seems to be exactly in point. The head note prepared by Mr. Justice Harlan, reads:

> "The practice of granting remissions of pecuniary penalties and forfeitures, by officers other than the President, sanctioned by statute and acquiescence for nearly a century, as a valid exercise of authority, and no invasion of the power of pardon granted by the Constitution to the President, is too firmly established to be questioned."

In that case fines were remitted by the Secretary of the Treasury and it was claimed this was an invasion of the power of the President.

The court said:

> "The warrant of remission, it is contended by the libelant, is without legal effect, and should have been disregarded, because the statute upon which it rests is in conflict with the clause of the Constitution investing the President with power 'to grant reprieves and pardons for all offenses against the United States, except in cases of impeachment.' The argument advanced in support of this position, briefly stated, is: That the power of the President to grant pardons includes the power to remit fines, penalties and forfeitures imposed for the commission of offenses against, or for the vio-

lation of the laws of, the United States; that such power is in its nature exclusive; and that its exercise, in whatever form, by any subordinate officer of the government, is an encroachment upon the constitutional prerogative of the President.

"It is not necessary to question the soundness of some of these propositions. It may be conceded that, except in cases of impeachment and where fines are imposed by a coordinate department of the government for contempt of its authority, the President, under the general unqualified grant of power to pardon offenses against the United States, may remit fines, penalties, and forfeitures of every description arising under the laws of Congress; and, equally, that his constitutional power in these respects cannot be interrupted, abridged or limited by any legislative enactment. But is that power exclusive, in the sense that no other officer can remit forfeitures or penalties incurred for the violation of the laws of the United States? This question cannot be answered in the affirmative without adjudging that the practice in reference to remissions by the Secretary of the Treasury and other officers, which has been observed and acquiesced in for nearly a century, is forbidden by the Constitution. That practice commenced very shortly after the adoption of that instrument, and was, perhaps, suggested by legislation in England, which, without interfering with, abridging, or restricting the power of pardon belonging to the Crown, invested certain subordinate officers with authority to remit penalties and forfeitures arising from violations of the revenue and customs laws of that country. Stat. 27 George III., chap. 32. See also Stat. 51, George III., chap 96, and 54 George III., chap. 171."

See also:

Stuart vs. Laird, 1 Cranch, 299 (1803);

McKeen vs. Delancy's Lessee, 5 Cranch, 22 (1809);

People vs. Goodrich, 149 N. Y. Sup., 406, 411 (1914).

I submit that the long continued exercise of this power by our courts is one of the most important elements of this case and strongly supports the conclusion that the power exists and is properly exercised.

5. The Courts May Retain Jurisdiction After the Close of Terms of Court for the Purpose of Completing the Exercise of this Power.

The order entered in the case under review directed the term to be kept open for five years. I do not think this was necessary. If the power exists, it cannot be cut off by the close of the term. The situation is exactly the same as continuing jurisdiction in any undisposed of case.

I prefer to dispose of this question without discussing the authorities bearing upon terms of courts, by adopting the language used in 1561 by the Justices in 2 Dyer 205 a.

> "And yet by the opinion of all the Justices the order of further respite is good enough; and the custom of the realm has always been so."

6. The Defendant May Have a RIGHT to a Suspension of Sentence in Some Circumstances.

To what extent is a citizen of the United States entitled as a matter of right, to a suspension of a sentence against him, to enable him to apply to the President for a pardon?

In *Ex parte Wells*, 18 How., 307 (1855), Mr. Justice Wayne said the President's power of pardon was to be exercised:

> "* * * * * particularly when the circumstances of any case disclosed such uncertainties as made it doubtful if there should have been a conviction of the criminal, or when they are such as to show that there might be a mitigation of the punishment without lessening the obligation of vindicatory justice. Without such a power of clemency, to be exercised by some department or functionary of a government, it would

be most imperfect and deficient in its political morality, and in that attribute of deity whose judgments are always tempered with mercy."

If the President owes this duty to the unfortunates who may have occasion to ask his clemency, it seems they must have a corresponding right to a hearing and to fair and impartial consideration.

There have been cases in which it was claimed citizens were denied a right to this consideration by reason of the fact that the executive was prejudiced.

Of course, there are no authorities to be cited on this point. Any citizen has a right to a fair and impartial hearing of his application for a pardon, and, if so, reasonable means must be afforded to exercise the right and to obtain a hearing.

Is it not within the power of a court and is it not its duty to suspend a sentence until a pardon has been refused, in a case in which the court believes a pardon should be granted?

Assuming that courts do not have the power to suspend sentences indefinitely, may they not suspend sentences until the executive refuses to pardon?

If a court believes punishment would be unjust, or that a pardon should be granted, may it not suspend sentences until a pardon has been refused?

In *Allen vs. State*, Martin & Yerger, 294 (1827), the Supreme Court of Tennessee held a convicted person had a right to a suspension of sentence to enable him to apply for a pardon. The court said:

> "The remaining ground for the success of this application to the Court is the Constitution. By it 'the Governor shall have power to grant reprieves and pardons after conviction, except in cases of impeachment.' Here the power to grant a reprieve or pardon is unquestionably given to the Governor. But this power would be given in vain, unless an opportunity was given for its exercise by him. The means of exercising the power must also then come within the Constitution, and be a constitutional right. The means,

therefore, must be a right in the convicted citizen to be afforded by this Court, in those cases where the final judgment, after conviction, is rendered thereupon. This right must, of necessity, supersede the immediate execution of the judgment, or the carrying the same into effect, as far as is reasonably necessary, under the circumstances, for its exercise, or the making the application to the governor.

"It is asked from this Court, by the plaintiff in error, as the means of enabling him in the present case to exercise his constitutional right to suspend, until the next term of this Court, the execution of the judgment, and in the meantime, to admit him to bail.

* * * * *

"This Court have little doubt but that in cases of manslaughter, the execution of the judgment ought to be suspended, for the burning in the hand is the most important part solicited as the object of pardon, which, if inflicted, the benefit of the privilege would be much impaired."

In *Crane vs. State*, 94 Tenn. 98 (1894) this was qualified and it was held a suspension should not be granted unless in the opinion of the court a pardon is merited.

The South Carolina courts hold that there should be a suspension of execution of sentence to allow an application to be made for a pardon whenever the law inflicts, upon conviction, a specific and infamous punishment, or where, but for a suspension, the convict would irretrievably lose some legal right.

See:

State vs. Chitty, 1 S. C. (Bailey) 379 (1830);
State vs. Abbott, 87 S. C. 466 (1911).

In the case now under consideration the minimum penalty for each offence was five years' imprisonment and the statute gave no discretion to the court. It must be five years or nothing. The defendant may have stolen a cent or a million and may have been weak-minded or not, the penalty was five years.

In such a case, I submit a court may pass the responsibility to the executive and let him say whether the penalty shall be enforced or not.

It will not do to allow the convict until the next term of court, or any definite time, to obtain his pardon. He may or may not be able to be heard in the time fixed.

The responsibility should lie on some one other than the court and it may properly leave it to the executive to hasten or delay the result.

A court should not assume the burden of imposing cruel and oppressive penalties. A court should never voluntarily permit injustice to be accomplished.

In proper circumstances, I submit a court may and should suspend its judgment until the executive has taken the responsibility by either allowing or refusing a pardon.

In *People vs. Mueller*, 4 Crim. Law. Mag. 725, 15 Chi. Leg. News, 364, (1883) Judge Barnum said:

> "The power of the court to suspend was neither discussed or denied. It becomes my duty, none the less, to pass upon it as an alternative to entering a judgment which would consign an innocent man to the penitentiary. It is true the governor might pardon the prisoner after sentence, but who shall pardon the court for the iniquity of a judgment of guilty upon a man not guilty. Pardons are for the guilty; the innocent are entitled to justice rather than mercy."

7. What Facts Should Be Shown or Appear to Make it Proper for the Court to Exercise the Power to Suspend a Sentence?

The right to suspend temporarily for many purposes is conceded, so the question is when may or should a court suspend a sentence indefinitely?

The power to suspend sentence capriciously or arbitrarily is not claimed, and so far as is known no judge ever claimed or exercised that power.

The power claimed is the power to suspend sentence indefinitely in cases in which the imposition or execution of sentences would result in injustice.

It is not claimed that the power may be exercised for the purpose of terrorizing a convict or keeping him subject to the caprice of the judge.

A convicted person, subject to the penalties fixed by law, may insist on receiving and executing his sentence, and sentences should never be suspended indefinitely over the objection of a defendant.

The claim is made by the government that it also has a right to have judgment entered and executed, but it is submitted that all penal laws are subject to the exercise of this power by the courts, and when injustice will result, the penalties of the law may be suspended.

The rights of the defendant and the government in this respect are considered in *Gehrmann vs. Osborne, supra.* Vice Chancellor Garrison said:

> "The two points of view from which the matter must be considered are, of course, that of the state or public on one hand and that of the defendant on the other. Since the measure of the punishment to be inflicted in any given case (excepting some few of which murder in the first degree is a conspicuous example) is left entirely at the discretion of the court, it would seem that, from the public point of view, it must be held that the public rights are presumably protected by whatever the judge in his discretion does in this respect. It is for him to determine whether the defendant shall pay a fine within the limits fixed by the statute, or suffer some imprisonment, within limits similarly fixed. And it can well be argued from the standpoint of public policy that it is proper for the court, in those cases where it finds that the public interests will best be served by not presently imposing any sentence to thus deal with the subject.
>
> "Considerations of public policy may often properly induce a court to hold off inflicting punishment for such a time as that course seems discreet to the court.

The power would seem to be analogous to the immunity that courts in their discretion, may give an accomplice to aid the prosecution. (*State vs. Graham*, 41 N. J. Law, 15, (Sup. Ct. 1879) 32 Am. Rep. 174), and is similarly exercised where one equally guilty has pleaded guilty, or *non vult*, and has aided the state in the trial of the others concerned in the commission of the crime."

As to the necessity of obtaining the defendant's expressed or implied consent to the suspension Vice Chancellor Garrison said:

"From the defendant's standpoint, the only legitimate objection, it would seem to me, to the action of the court in refraining from presently inflicting punishment, would be the undesirability of remaining in the indeterminate position resulting from a suspension of the pronouncement of judgment. But is not this essentially a matter within his own control? Undoubtedly any convicted defendant could compel the proper court, by *mandamus*, to pronounce judgment; and, in my view, if a court sought to postpone the sentencing, or suspend it, for any purpose or any period which would be clearly unreasonable, the defendant could fully protect his rights by objection which would, undoubtedly, in my view, result either in the trial court not attempting to exercise the jurisdiction in the face of objection, or in the supreme court holding that, in the face of an objection, the trial court acted improperly in unreasonably delaying the pronouncement of judgment and subsequently pronouncing one.

"As a general principle, I should say, that, either the successful or the defeated party in any litigated proceeding, civil or criminal, could move for judgment at any time when and after the matter was ripe for judgment.

"But if the defendant acquiesces, or does not object, it is difficult to see how he can be said to be injured. It is necessary to remember that the defendant has been convicted; that the court has the power to inflict the full measure of punishment; that if a defendant, thus in peril of suffering the full penalty of the law, is not visited with it, many things may hap-

pen favorable to him; while nothing worse than his present plight can possibly happen. If a defendant thus circumstanced sees fit not to object, or to acquiesce, I do not see who else is concerned that can complain, nor how he can legitimately complain.

"I feel quite sure that, under the criminal law as administered in this state, where every right of the defendant is zealously guarded, and the state is held to have power to inflict punishment only when every step has been taken in exact accordance with legal procedure, there is no danger that a defendant will have any right violated, or be in any way oppressed, if the custom so long in vogue is continued.

"I am inclined to say,—although, of course, not to find, because it is not in issue,—that the power thus to indefinitely suspend sentencing, which exists in the court, is not exercisable in the face of an objection by the defendant; that when exercised in default of objection, and with either implied or actual acquiescence, it is a lawful exercise of power residing in the court, and cannot result in the release of a prisoner subsequently sentenced, and who applies by a writ of *habeas corpus* for that purpose."

In *State vs. Hilton*, 151 N. C. 687, 692 (1909) the Supreme Court of North Carolina says:

"And in the more recent applications of the principle the better-considered decisions are to the effect that the power indicated should only be upheld when sanctioned by usage, and where the consent of the defendant was expressly given or would be implied from the fact that its evident purpose was to save defendant from a more grievous penalty permitted or required by the law."

See also:

Marks vs. Wentworth, 199 Mass. 44 (1908).

It is not claimed that a suspended sentence may be forced upon a convict as a commutation of sentence or conditional pardon may in some cases.

See as to conditional pardon without the consent of the convict:

Ex parte Wells, 18 How. 307, 315 (1855).

I do not concede that the court is without power, unless the defendant consents, but rather put it that in ordinary circumstances the court will not exercise the power without the consent, express or implied, of the defendant.

An objection made by some courts to a suspension of sentence is that it leaves the defendant in an uncertain position, in that he cannot tell for an indefinite period whether he is a free man or a convict, and while the sentence may be for a definite time, he may be subject to the suspended sentence for a much longer period.

These courts overlook the fact that the defendant may have immediate and certain punishment if he insists.

There is a suggestion in some of the cases that the suspension should not continue beyond the term of the sentence and some statutes have fixed the term of suspension at double the term of sentence.

See:

Harris vs. Nixon, 27 App. D. C. 94 (1906).

It is submitted that the suspension is limited only by the same rules that make the exercise of the power to suspend proper, that is, the order of suspension may not be vacated and sentence imposed or ordered executed when that course would be unjust.

The North Carolina court in *State vs. Hilton, supra,* says that no well considered decision will uphold the principle that sentence may be pronounced after an indefinite suspension of judgment when every condition attached has been complied with.

See:

State vs. Addy, 43 N. J. L. 113 (1881).

The Missouri Appeals case of *Ex parte Bugg, supra,* though denying the power, holds that sentence cannot be enforced after long delay when society would derive no good from its enforcement.

No fixed or inflexible rules governing the exercise of this power can or should be laid down. The rule was created, I believe, to provide for the unusual and extraordinary cases in which the strict enforcement of the law would be unjust, and this purpose might be defeated if the exercise of the power was too rigidly controlled. For the same reason, I believe the exercise of this power by the courts, without fixed rules, will be of greater benefit to society than the exercise of the power under statute.

The following from Maine's Ancient Law, page 367, is not inappropriate:

> "It is always easy to say that a man is guilty of manslaughter, larceny, or bigamy, but it is often most difficult to pronounce what extent of moral guilt he has incurred, and consequently what measure of punishment he has deserved. There is hardly any perplexity in casuistry, or in the analysis of motive, which we may not be called upon to confront, if we attempt to settle such a point with precision; and accordingly the law of our day shows an increasing tendency to abstain as much as possible from laying down positive rules on the subject."

This tendency mentioned by Maine is shown by the English laws, which fix no minimum punishments.

The view taken by respondent that the practice of suspending punishments avoids improper acquittals (Answer, page 3) is supported by the results following the English laws omitting minimum penalties. (See Kenny—Outlines of Criminal Law, page 485.)

The exercise of this power should be left to the discretion of our judges with perhaps the caution that it applies only to extraordinary cases in which great injustice will result from the strict enforcement of the letter of the law.

Judge O'Brien in the New York case said:

> "It is a power which the court should possess in furtherance of justice, to be used wisely and discreetly, and it is perhaps creditable to the administration of justice in such cases that the power has always existed, no complaint has been heard of its abuse."

In *State vs. Crook*, 115 N. C. 760 (1894), the Supreme Court of North Carolina said:

> "The exercise of this discretionary power has not heretofore been questioned, and the beneficial effects of its judicious use have been made so manifest as to commend it both to the Judges and the people."

The courts exercise a similar discretion in allowing bail, particularly after conviction.

It appears in *1 Journal of Criminal Law*, 438, that a committee of the American Institute of Criminal Law and Criminology concluded a report thus:

> "We approve of the suspension of sentences to imprisonment when coupled with like suspension and limitations, (i. e.) when coupled with thorough supervision by competent officers and when applied consistently with public safety to those cases in which there is a reasonable prospect of reform."

The fact that this power has been freely exercised by our judges in one form or another without complaint of its abuse, justifies its continuance.

Though I cannot furnish the historical proof, I believe this power has existed and has been exercised in some form from the very earliest times. It puts into effect the principles on which punishment should be administered, as laid down by the Laws of King Cnut:

"Though any one sin, and deeply foredo himself, let the correction be regulated so that it be becoming before God and tolerable before the world."

Respectfully submitted,

EDWIN J. MARSHALL,
Counsel for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1915.

No. 11 Original.

EX PARTE THE UNITED STATES, *Petitioner.*

MEMORANDUM OF RESPONDENT, *(In Pro. Per.)*

JOHN M. KILLITS,
District Judge, Northern District of Ohio,
Respondent.

NOVEMBER 30, 1915.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1915.

No. 12. Original.

EX PARTE THE UNITED STATES, *Petitioner.*

MEMORANDUM OF RESPONDENT, *(In Pro. Per.)*

Believing that an exposition of respondent's view of the question in this proceeding, beyond the statements of the formal return, might not be unwelcome to the court as a supplement to Mr. Marshall's exhaustive brief, we venture the following, taking the liberty also to bring to the attention of the court developments of the discussion which have appeared since the preparation of the brief.

When the rule herein was ordered, suggestions were invited from every Federal District Judge. All but six or eight answered. Whatever may have been their reluctance to assist the Department of Justice (Reply, p. 9), few hesitated to write fully to respondent. With hardly an exception, including the minority who narrowly construe the powers of their courts and are unable to entertain the discretion now questioned, they were cordial in their sympathy with respondent's course and emphatic in expression of opinion that the lodgment of such power in the trial judge was highly desirable in the interests of society. The return to the rule was

prepared from this correspondence as far as it went at the time and, before final printing proofs were submitted for correction and further suggestion to the judges whose districts were mentioned. This privilege was used in notable instances, and the return may be truly accepted by the court as representing, in great part, the view of other judges.

This interchange with his fellows on the district bench warrants respondent in saying that that district judge who will not learn with gratification that this court affirms the existence of the power under question, and who will not regard such a decision as equipping him with an effective weapon for social good and for the administration of justice, is an exception. This of course is no criterion of the validity of the practice, but it does confirm respondent's feeling that this case is not a mere law-suit, or even an adversary proceeding, but one presenting an issue of general interest, an issue, within its own range of influence, of very great importance to society; one which, if the restraints of proper construction of judicial powers permit, should be settled against the writ prayed for.

If the proceeding were a law-suit only, of no importance beyond the mere question whether a mandamus should issue against the respondent in the specific instance, we might question the form of the remedy selected by the Attorney General, and certainly we would insist that the Department of Justice was proceeding against the wrong respondent. If the discretion undertaken to be exercised in Henehan's case is not enjoyed by the court the order of suspension is a mere nullity and the only proper way to test it, it seems to us, is not to seek to compel the judge to revoke a plainly void order, but to ask for a writ to compel either the issuance or execution of an order of commitment. If the convict is in custody, the issue would arise only in *habeas corpus* proceedings. In this

case it would seem upon the record (page 38) that the only proper respondent is the clerk, who cannot be excused from issuing a mittimus because of an order of the court which the Department holds to be palpably void. However, we hope the court will not deny the writ for want of a proper respondent.

We are moved to this comment because the Attorney General, who declares himself unable, for want of proper appropriation, to allow respondent out of public funds for expenses in defending the rule, except the bare cost of printing, has filed a reply to respondent's return in which, pleading ignorance of the facts from other districts stated specifically in the return, contains this paragraph;

> "As to the several matters averred in the return of which knowledge is denied in this reply, and which are not admitted, strict proof thereof is demanded."

If this demand is insisted upon, we are required to use private means in the incurring of large expense to present to the court facts which are peculiarly in the knowledge of the Government, through the Department of Justice, because they are contained in the records of courts which are in the custody of that Department. In such case respondent must either abandon a feature of the defense which is of the greatest importance, because proof of a somewhat general and long continued practice, like that questioned, is manifestly of great pertinence and force, or we must ask the court to indulge us with time to bring to its attention, and it to receive as satisfactory evidence, the informal statements of judges and clerks. To make strict proof involves an expense which neither this respondent, nor the particular convict whose fortunes are directly at stake, can incur. The very great labor and careful attention manifestly involved in the preparation of Mr. Marshall's brief herein has been without arrangement for or expectation of compensation.

If proof is required that the practice of relieving a convict whose circumstances are exceptional, either by deferring imposition, or by suspension of execution of sentence, is of long standing and of frequent indulgence in United States Courts, respondent will be able to show a much more general observance than indicated in the return, for later correspondence with the judges justifies the inclusion of the Districts of Indiana, Eastern, Western and Northern New York, Eastern and Western Pennsylvania, Montana, Eastern Washington, Eastern Oklahoma, Western Oklahoma, Oregon and South Carolina. The data before respondent indicates a long continued resort to this practice in almost every district, when it seemed that circumstances peculiar to the particular case demanded extraordinary action. In most cases this was done by suspending operation of sentence, almost as frequently by deferring its imposition. Some courts follow the latter practice alone, others use either according to circumstances. Even judges who hold to the Government's extreme view that punishment in execution must inevitably follow conviction, and who reject the doctrine that their courts have any inherent power in the matter, as shown by the correspondence referred to, confess to the use of expedients to accomplish the same end, such as entering an order to withhold mittimus until the district attorney moves therefor, or taking sentence "under advisement" to some later date, even to another term, and then forgetting the case unless moved to a consideration by the district attorney. Of all the district judges who have written us on the subject, but one objects to the providence of such power in his court and the ground of his objection is that it would inconvenience the court unduly!

The Attorney General summarizes the fluctuations of the practice in the Federal courts, as found on page 11 of his reply to respondent's return, thus:

"1. The practice of suspending sentences was never general throughout the United States at any one time.

2. That always in some one or more districts of a single state embracing more than one district, the practice would be indulged in one of the districts and rejected in another.

3. That there was always one or more districts in which at one period the practice would be indulged in and at another period it would not.

4. It was exercised by some judges on the plea of *ex necessitate*, but in recognition of their lack of power; and by some only because they felt it was tolerated by the Government and without any claim of right."

This outline of the situation falls short of establishing a loss, by non-use, of the powers which inhered in "courts" in 1787. Statements 1 and 4, if true, cover no more than mere exceptions to a very general condition and hence are insignificant. Numbers 2 and 3 are not accurate when applied to Ohio at least, for our information is clear that the practice obtained continuously, under all judges in both districts of Ohio, for more than forty years immediately prior to the Attorney General's instructions against it directed to the district attorneys, January 30, 1915.

We submit that the facts are indisputable, not affected by the summary quoted above, that the practice has had so long continued, and so very general an application in Federal courts as to have amounted to a custom, the interruptions or infrequencies of resort to it being very largely accountable to variations in the amount and character of criminal work in the several districts, or to the dispositions of individual judges. We can see how a judge who values his own convenience excessively, or one recently come to the bench without much previous experience with the criminal branch, or one disposed to close and literal analysis of the written law as the source of his judicial power might not favor it. The districts, too, necessarily vary in the kinds of crimes most frequently

committed in them. Toledo, which is the seat of one of respondent's courts, is one of the greatest railroad centers in the United States, at least as a transfer point. Hence it is that violations are extraordinarily numerous of the law of February 13, 1913, giving Federal courts jurisdiction of depredations upon freight in interstate transit. Very many of the more than eighty persons who have been before respondent's court under this act are in or just emerging from adolescence and with no criminal records. Districts will occur to the court wherein Federal crimes of this character are very rare.

The Government's reply to respondent's return informs the court that for more than twenty-five years the attention of Congress has been directed to this practice. The failure of Congress to act, we respectfully suggest, either to approve or reprehend it by legislation, is, at least, as much evidence of legislative approval as of disapproval. Moreover, H. R., 15578, in the last Congress, when introduced by the consent of the Department of Justice, contained in Section 269, as the Government admits (Reply, page 10), "a provision prohibiting the exercise of this power." It is true that, eliminating the declaration against the power, the House of Representatives did not adopt a suggestion to provide definitely for its exercise, yet, as the bill passed the House and went to the Senate, Section 269 was so modified, beyond a mere elimination of the declaration against the power, as, through the insertion of the words "unless suspended" when dealing with the execution of criminal judgments, to bear a construction that the practice was not obnoxious to the legislature. The bill was not reported out of the Senate Committee.

Aside from its failure to deny the averments of respondent's return quoted below, the reply thereto inferentially admits their truth, and it is in this record, as averred by respondent (pages 4 and 8), that,

"In Respondent's own district, at least since July 1, 1910, and until about January 30, 1915, when the Attorney General of the United States issued instructions to all District Attorneys to object to the practice, all suspensions of sentences were with the consent of the District Attorney, and in a majority of cases, they were upon his recommendation.

"* * * That the exercise of the power now in question has been acquiesced in by the Department of Justice and the Presidents for nearly a century, and the records of the courts show instances in which the Department of Justice requested the courts to exercise the power."

The paragraph last quoted describes the whole current of representation in our correspondence; none of the judges but say that they indulged the practice with the consent, and often on the recommendation, of the District Attorney, and sometimes on direct request from the Department.

We do not believe that the consent of the Department is essential to the exercise of this power; we refer to this history only to show that we have a court practice observed for many years, and very generally over the country, for the existence and continuance of which the legislative and executive branches bear considerable responsibility.

Since the preparation of the main brief, our attention has been called to an article by Professor Barnett, of the University of Oregon, on "Executive, Legislative and Judiciary in Pardon," published in the September-October, 1915, number of the American Law Review, the court's consideration of which is invited, although the conclusions of the author, as to the precise point in this case, are adverse to respondent's position. The dominating features of this article are, the great diversity of judicial opinion exhibited, the amazing variety of argument indulged in, and the undoubted and steady tendency of trial courts, almost *ex necessitate*, as the agencies having the earliest and clearest understanding of the

force of those circumstances which are peculiar to the particular convict and his crime in its extent, occasion and manner of accomplishment, and in his relation to his community, to vary the force of the incidence of punishment as prescribed by the law. The impulse to act is so strong, and is so consonant with the spirit of an age which has enlarged its view of the function of a criminal prosecution, that the constant effort, conscious or otherwise, of the judge, is to avoid in special cases that unvarying and rigorous application of the law for which the Gevornment here contends. So various subterfuges are resorted to, such as the postponing of a motion for new trial, or delaying the hearing of a motion in arrest of judgment, or indulging a liberality of determination of the value of recognizances; these in addition to the expedients which our correspondence shows have occurred to Federal judges.

The books show that even courts of last resort are at pains, sometimes, to find extraordinary ways to avoid the consequences of their own reasoning, when, respecting the particular convict involved in the case before them, that leads them to a situation which affects as wrong their senses of natural as distinguished from legal justice. We note *Ex Parte Bugg*, 145 S. W., 831 (Missouri), and *Re Webb*, 89 Wisconsin, 354. In the first named case the court held that the trial court had no power to suspend execution of sentence because so to do was to "usurp" the pardoning power, and that a void order of suspension, followed by the convict's freedom, did not destroy jurisdiction to hale him into court to be committed after the term, wherefore, strictly Bugg's writ in *habeas corpus* should be denied; but, reflecting that punishments are inflicted solely for the protection of society and that "the criminal laws are not based upon any idea of retaliation against the offender", the court proceeded to determine that in Bugg's case society could "no longer have any interest" in the enforcement of his penalty. Therefore, having consider-

ation for the convict's interest only, it allowed the writ and freed him. It does not appear that the constitution of Missouri divided the pardoning power between the Governor and the Supreme Court. In the latter case, holding that the court's order of suspension was void, the convict escapes on the theory that, the time having expired within which he should have completed his term which, the court says, began to run *eo instanti* the sentence was pronounced, the court had no power to order his commitment; in other words, that he had served his sentence in legal effect, although at all times at liberty on his own application.

We respectfully submit that the dignity of the law requires the issue to be squarely met; that the ends, which all trial judges see should be attempted, may be worked toward under methods recognized to be within the court's powers rather than by subterfuge and thinly veiled evasions of what the Government in this case holds to be an inexorable and inescapable duty.

It ought not to be that a court should be put in a position like that occupied by respondent's court in Henehan's case, wherein it is required to impose a sentence, as a minimum, very far beyond that which, independent of statute, the circumstances peculiarly in hand called for, conceding that an imprisonment sentence to be immediately executed was alone in the court's power to impose. Giving all the force respondent is able to grant to the elements of breach of trust, the relation of a bank to the public, the interests of the Government and the public in securing faithful service in a national bank by a penalty operating *in terrorem*, the fact that the convict entered upon and continued in his employment under the penalty of Section 5209; those criteria determining extent of punishment in addition to the amount of the peculation, and which indicate a severer penalty than in a case of larceny from a private indivdual, still it impressed respondent, then, and the feeling abides, that, considering all the surroundings of his

case, to send Henehan to confinement for five years would be shocking, a miscarriage of justice instead of its due administration. We are under obligation to the Attorney General, in his reference to un-named district judges in Pennsylvania (page 6, Reply) for assurance that this feeling was not an individual idiosyncrasy but had impressed other courts under similar circumstances. We hold this impression with recognition that the court has a duty to adhere to statutory penalties.

Recurring again to the Government's reply to the return, we suggest that it is no argument that the power does not inhere in the court to show that it has been abused by Federal judges. We might as pertinently cite the court to the many instances known to the respondent in his own judicial experience, and to those reported by judges in many other districts, in which, by the action in dispute, society has indubitably regained from criminal ranks valuable factors in men who have found the court's trust, coupled with its power of punishing a trust betrayed, just the moral stiffening necessary and efficient to turn them to and to maintain them in upright lives. To call the roll of the score or more of convicts in respondent's court, under respondent and his predecessor, Judge Tayler, and his late colleague, Judge Day, most of them young men, who, in their lives and attention to their social responsibilities, are each justifying the court's trust, would impressively sustain the social principle of the practice, and the impression would not be lost in comparison with the court's experience with the five or six who have betrayed the court's confidence and have been required to suffer sentences.

The return (page 2) makes it plain that a discretion is to be used only with definite relation to the benefit of society through a disposition of the individual calculated to restore him to normal social efficiency. There is no claim that in its exercise either caprice or arbitrary decision has any place.

So far as Federal practice may be settled by an inferior court, the law applicable here is not that stated in *United States vs. Wilson,* 46 Fed., 748, but is that of the recent case (8th Circuit Court of Appeals) of *Morgan vs. Adams,* Judge Sanborn's decision, concurred in by Judges Carland and Trieber, overruling the Wilson case and assimilating the Federal practice as to the sole point decided by the court, with the State authorities upon which this respondent relies. The case is of interest because Adams was the beneficiary of a suspension of execution granted by Judge Day of respondent's court in the Eastern Division. During the second term thereafter the convict violated the conditions of his liberty and was taken to Leavenworth. On habeas corpus the court of the District of Kansas followed the Wilson case and many of the authorities relied on by the Government in its reply to the return, and held that,

> "Because the court ordered the sentence suspended during good behavior of the accused at the same time that it rendered the judgment imposing sentence, the latter was unauthorized by law, the commitment under which was illegal and did not justify the imprisonment of the convict."

The decision of the Court of Appeals is not yet published. From a copy furnished by the clerk it is noted that court recognized the question here to be one "upon which there is a conflict among the authorities," and decided the case "without the expression or intimation" of its views thereon, but, acting upon the concession of both parties to the action that the trial court was without the power, and adopting for the case before it the conceded theory that the order was wholly void, it held that the "sentence stands and is enforcible by the court at any time after its rendition, either before or after the term of the court, until the convict has suffered the penalties it imposes." In Adams' case the order of suspension was embodied in the judgment imposing

sentence. The court holds that if the former were void, it was separable from the latter, whose force remained unimpaired.

If Judge Sanborn's conclusion is accepted that jurisdiction is not lost by suspending execution of sentence, much of the argument and the grounds of decision, of many cases upon which the Government relies in its reply to the return lose much of their force for the opinion of the Circuit Court of Appeals is opposed to *Re Markuson,* 5 North Dakota, 180; *Ex Parte Clendening,* 97 Pacific, 650; *Re Webb, supra,* and other cases holding jurisdiction to be lost by lapse of time.

In Henehan's case as distinguished from that of Adams, the order of suspension was not a part of the judgment of sentence, but was carried into a separate order.

Recurring to *United States vs. Wilson, supra,* which the Government uses as authority for the statement (Reply, pp. 9, 12), that the practice, since 1891, has been "opposed to a decision of a District Court of the United States", we observe that, first, that case involved an infraction of a local (territorial) statute, and, second, the decision was controlled by a provision of the Idaho law which required, except in certain instances provided by statute, that sentence should be imposed at the term at which conviction was had. Wilson was convicted in June, 1888. Imposition of sentence was suspended and was not thereafter attempted for two years.

It is curious to learn, through correspondence with the present judge of the District of Idaho, that Judge Beatty, who decided Wilson's case denying the power generally, was himself accustomed to exercise it when he had a special reason affecting a convict under the federal laws.

We have not hitherto cited the Districts of Idaho and Eastern Wisconsin as contributing to the survival of the power from common law times, but it is to be noted that the predecessors of the present judges, in each district, did indulge

this practice, for which the present judges are not able to see a valid warrant. In Idaho, so the present judge informs us, a demand is found, however, at times to resort to expedients to the same end which, in his judgment, have more color of authority, and which are employed with the consent of the district attorney.

The Government's reply affects to disparage the force of respondent's citation of Federal precedents, notably those from Massachusetts and New York, by alleging that they were influenced by local practices in the State courts. The Attorney General, however, is mistaken in the statement, as to either state, that the practice "is affected by specific legislation" or "is based upon a statute enacted (in New York) in 1893," for the courts in *Commonwealth vs. Dowdican's Bail*, 115 Mass., 133, 136, and in *People ex rel Forsyth vs. Court, etc.*, 141 New York, 288, distinctly hold that the power inheres independent of statute. Of course we are not claiming that a practice, not otherwise justifiable, may be sustained in the Federal courts because followed by the courts in which the Federal district lies. The local practice is only significant of the survival of the common law power. We may say that the inherent power of a State court to suspend the execution of sentence is no longer an open question in Ohio. Mr. Marshall cites *Weber vs. State*, 56 Ohio, 616. Since the preparation of his brief, through a development in a State trial court, there has been brought to our attention a decision without an opinion by the Supreme Court of Ohio, *State vs. Whiting*, 83 Ohio State, 447, decided October 11, 1910. This case was decided after the passage of Sections 13709 to 13715 inclusive, General Code of Ohio, the provisions of which apply to the crime of which the convict Whiting was guilty. We have before us the record and briefs in the Supreme Court of Ohio. But one question was argued, presented and decided. The crime was a felony. The entry of suspension, after stipu-

lating the conditions of the latter, recited: "The court in making the above suspension does not make the same under the authority of an act entitled, 'An Act, etc.' (G. C. Ohio, Secs. 13709, *et seq.*), but does so under claimed inherent authority on the part of the court to suspend sentence." Exceptions were taken directly to the Supreme Court under the Ohio practice by the prosecuting attorney. The authorities pro and con which are familiar in the arguments in this case at bar were discussed in the briefs and the attention of the court was called to the provisions of the court parole law. The Supreme Court, without a dissent, adhered to its decision in *Weber vs. State*, and overruled the exceptions. There can be no question but that this decision, although not accompanied by an opinion, is an affirmance of *Weber vs. State*. The Ohio court thus found itself in harmony with *State vs. Osborne*, 79 New Jersey Equity, 430, 445, and opposed to *People vs. Barrett*, 202 Ill., 287.

In all the discussion of this subject, judicial and lay, it is conceded that common law courts in 1787 had the power both to suspend the imposition of sentences and to suspend execution of sentence imposed. Professor Barnett in his paper referred to (volume 49, American Law Review, pages 709, 713), makes this clear. (See also, *State vs. Osborne*, 79 New Jersey Equity, 430, 441.)

The decisions which hold against the presence of this power, and especially that the second form of its exercise is without warrant, aside from the general objection that it is an invasion of the executive function, group themselves roughly into five classificatons:

1. Those which maintain in substance the doctrine of *People, ex rel., etc., vs. Allen*, 155 Ill., 61, that

> "The state has a right to demand and the welfare of society requires that those who are convicted

and found guilty of violations of law shall be promptly and certainly punished."

2. Those which adopt the view that the reasons for conceding the power to common law courts fail in this age because the rigors of administration of criminal law have been very materially abated in the last century, and the right of review now obtains. Of this, *Spencer vs. State*, 140 Southwestern, 597, may be cited as an example.

3. Those which deny the power because criminal courts have no common law criminal jurisdiction.

4. Those that hold that jurisdiction over the convict is forever lost by the attempt to suspend execution indefinitely at the pleasure of the court, even upon his own application.

5. Those holding that when the statute provides a method by which courts may admit the convict to parole, such statutory powers exclude the operation of any analogous power, even though otherwise concededly inherent. This is the doctrine of *People vs. Barrett*, 202 Ill., 287. Very recently a Common Pleas Court of Ohio (*State vs. Radcliffe*, 26 Ohio Decisions, 87, Law Bulletin, November 15, 1915), admitting knowledge of the fact of the decision (without opinion) in *State vs. Whiting, supra*, refused to suspend execution of sentence solely on the theory of *People vs. Barrett*. Had the court examined the record behind the decision in the Whiting case it would have found itself confronted with the alternatives of overruling its own Supreme Court or of avoiding the authority of the Illinois case.

Considering the general objection, the main brief has called the attention of the court to the exercise of analo-

gous powers in the administration of criminal law which are not conceived to be invasions of the executive jurisdiction. The practice of entering *nollies*, of immunizing accomplice witnesses (*State vs. Osborne*, 79 New Jersey Equity, 430, 444), of imposing two or more sentences of imprisonment to be concurrently served, of remitting fines by executive officers under statutory provisions, of paroling convicts by courts under such statutes as Sections 13709, *et seq.*, Ohio, are each in close analogy to the practice in question. Two of these have no other sanction than public policy and custom. It would seem that if the court cannot parole without a statute because so to do is to invade the province of the executive, the act is not changed in character in this respect because it is done under the sanction of legislation. It seems that the difference between a pardon with the consequent restoration of all rights forfeited by conviction, and a parole under all the burdens of a conviction except actual confinement, is too obvious for even confused thought. In the latter case the convict is far from restoration to the freedom of action which is his under a pardon. The distinction between "a reprieve", as the term is used in constitutional provisions and the suspension of execution of sentence, is noticed by the courts (*In re* Buchanan, 146 New York, 264; Words and Phrases, pp. 6115-6116). One is not the equivalent of the other in the constitutional sense (*Ex Parte Wells*, 18 Howard, 307, 314; *Snodgrass vs. State*, 150 Southwestern, 162).

Considering the classifications above attempted, *seriatim*, we are unable to concede that invariably the welfare of society requires "prompt and certain punishment" of every one convicted of a crime, as the court says in *People ex rel., etc., vs. Allen, supra*. Celerity in the apprehension for and conviction of crime is exceedingly important to society and also to the individual convict who is not yet a hardened criminal, but with all the endeavor that mod-

ern thought has called into activity to adapt penal institutions to the reformation of the convict in helping him to a moral equilibrium, none, of all the many admirable and humanely conducted institutions of this country, has succeeded very far, because their efforts are handicapped by the community system and by the inevitable tendency of a convict, whose moral nature is weak, to lean upon those who are his official overseers. The doctrine quoted from Allen's case is not only abhorrent to the enlightened thought of an age when the psychology of crime is becoming understood, and the function of punishment therefor is obtaining a more exact definition in its relation to society, but one familiar, by experience, with the administration of criminal law can see that, when it is invariably adhered to, the principle in operation works a detriment to society which no effort, in the way of humane and intelligent reformatory methods in confinement fully overcomes. Certainly a punishment to be immediately executed is often the only resource, but many times we think it should be the very last.

A concrete example illustrating the argument interrupted the preparation of this memorandum. Of six young men under 22 years of age jointly indicted in respendent's court on the 18th of November, 1915, for molesting interstate freight (Act of February 13, 1913) two were of the age of eighteen and were without any criminal records and with no habits of idleness and mischief which had attracted the attention of the very vigilant juvenile court of Toledo. They were youths neither bad nor good—morally somewhat indifferent, but not idlers—with no pronounced bad habits and, in neither case, with vicious home surroundings. Under the leadership of a personality who deserved and received a three-year sentence to be immediately executed, they were present at, but not actively engaged in, the breaking into and rob-

bing of a car. The generosity of their leader bestowed upon each a pair of shoes. Under the law they were undoubtedly guilty. To give them a small fine would be manifestly wrong, for so to punish them would have the appearance of bartering their offense; to send them to jail as convicts would be to expose them to vicious surroundings and to confirm incipient tendencies if the term were a substantial one; to give them an unsubstantial sentence would be to belittle the law; but to give them a sentence which, in its character, would mark the crime as serious, with a suspension of its execution while maintaining an industrious and law abiding life, would be to send them forth with the endorsement that they have not forfeited all trust, an obvious help to them in their efforts to retrieve their almost thoughtless culpability and to establish a self-respect. The incentive to earn a freedom under these conditions operates, under our observance, as a strong factor in the development of a character resistent to temptation. At liberty now on their own recognizance and living under an appreciation that they have been apprehended under a serious charge, we look for them to face the court at the time set, some months hence, for whatever disposition of their cases the situation demands and warrants, with moral characters so far developed that society will get far more out of them than if they had each been promptly punished. It is absurd to say that pardon is available after conviction and should be their only chance of lenient treatment. Pardon for them is largely a theory. If they had the means and influence to seek it the grant would in due course come only after deterioration of character had had its opportunity through a sentence in execution. Attention has been called in respondent's return to the fact that a pardon application is not heard until after service of sentence is begun.

As to the second proposition, assuming that the courts of 1787 had the power only for the reasons alleged, still a power whose exercise is adhered to would not be lost simply because the reasons for calling it into being had ceased to exist. Until some definite denial of its continued vitality is established each exercise by a court would be presumed to have been for some cogent and sufficient reason peculiar to the case in hand. We cannot concede that reasons for this practice, as potent as in the times of Hale and Blackstone, do not now exist. Of course we have review, but review is only for those who can command means to take it. Four of the six young men referred to above have been sentenced to terms of imprisonment by respondent and are now under commitment. No one of them could have had a review of his case without financial assistance impossible except from charity. The very great change in the office of punishment, as viewed by the best thought, since Blackstone, affords a reason for the existence of the power more compelling than any of his day. Then punishment was punishment, nothing more. The law was to be vindicated by the suffering of the law breaker. Society benefited only by relieving it temporarily from his attacks, and perhaps through the deterrent force of the example in his sentence. Then the courts sought some way to relieve the convict of the harshness of the law. Now, we relieve him of the mistakes in the law's application, if he has the means for an appeal, but we find a better vindication of the law in reclaiming the individual, if possible, through the power to punish him, and we resort to the old and narrow idea of retributive punishment only when society can be served in no other way. We have abandoned the "traditional theory that a law broken meant that there was a wilful transgressor who deserved to suffer retributively." * We now understand that

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* Introduction to "Modern Theories of Criminality," DeQuiros, in The Modern Criminal Science Series.

it is for society's benefit that crimes are punished, and we consider society's interests first. If that interest may be best served by special treatment of the individual such a course is to be chosen under the logic of the reason which provides punishment for crime. No agency can be better equipped for this service than the trial court, and the tendency which the science of criminology shows to be reasonable is to enlarge rather than to curtail the powers of such courts. The right of appeal secures no benefit to society; it is an individual right.

Again, the power was used by the common law courts because inherent. It was not born of the severity of the criminal law, but, being already in the courts, it was exercised when an amelioration of the law's operation was called for, and therefore an abatement of the law's severity could not affect its inherency. The constitution of a court is not affected by a change in the laws which it administers. An inherent power is not lost because not continuously used for the special reasons which first invoked its exercise. They might fail and others develop which may operate just as surely to preserve its vitality.

There has been no atrophy of the power by disuse. We have shown herein that the executive department, and, in some measure, the legislative, is precluded from so claiming. An active experience of nearly twenty-five years with administration of the criminal law, almost equally divided between the prosecutor's office and the bench, state and federal, profoundly impresses the respondent with the necessity of this power in the court immediately in contact with cases under the law, and that it is indispensable if we are to deal with crime with that enlightened understanding which is developing criminology into a science. It may be that the Department of Justice, whose official personnel enjoys but comparatively brief service in point of time, having, however, a broader geographical jurisdiction, and having the enforcement rather than the administration of the law as a duty, is quali-

fied to speak *ex cathedra* on the subject. However that may be we are unable to see in *Pointer vs. United States,* 151 U. S., 396, 420, "an express declaration of this court that the existence of the power was then undetermined," (Reply, page 12) to operate, as the Government seems to think, as a warning to those courts attempting thereafter to "indulge" it; rather we read that decision as indicating an open mind, only, in the court, at least. The return sets up facts, whose existence is shown through the correspondence with other district judges, which indicate that the experience of respondent is that common to most judges whose service on the bench has been at all extended, for it is precisely the judges of the longest and most comprehensive experience who have been the most earnest in their suggestions to this respondent by way of assistance in this proceeding.

The authorities which deny the power because criminal jurisdiction is purely statutory are confusing power and jurisdiction. The latter may be entirely statutory, but, in the jurisdictional field, the former may exist as at common law. The legislature may limit a court's jurisdiction to crimes purely statutory without affecting the powers inherent in the court from its very constitution. Mr. Marshall (Brief, pp. 57 *et seq.*) has fully discussed the proposition that the Constitution used the word "court," even when applied to a tribunal to be created by legislative action, as designating a public agency having the attributes, as distinguished from jurisdiction, pertaining to the common law organizations, and respondent is not able to enlarge upon his argument. Of course it is that Congress may legislate this particular attribute away from a district court, but, it would seem, such action, to be effective, must be special or direct. In the face of a steady and very extensive practice, an inference merely from legislation which deals primarily with the court's jurisdiction should not be very readily admitted as an effective denial of an active and beneficial power.

Since the decision in *Morgan vs. Adams, supra,* we are not specially concerned with the decisions which adhere to the fourth theory against the possession of the power. There is no reason, at this day, when all effort is directed to the fairest consideration of one charged with crime, why argument should be refined to relieve him from the consequences of his betrayal of a beneficial trust which his own application invoked. We are confident this court will join Judge Sanborn's associates of the Eighth Circuit in approving his very sensible conclusions.

The fifth ground of objection fails in application to the case at bar because Congress has not enacted a general parole law.

Chancellor Garrison, in *State vs. Osborne,* 79 New Jersey Equity, 430, 445, effectually disposes of the argument that the power should not be left with the trial court because a convict under suspension would be exposed to possible embarrassment due to fluctuations in judicial temper, caprice on the bench, or malice of enemies, by pointing out that the convict creates his condition knowingly, that "in peril of suffering the full penalty of the law", if it is not immediately visited with it, many things in the future "may happen favorably to him; while nothing worse than his present plight can possibly happen." The chancellor thinks that if the convict does not complain, no one else need worry about his future. Again, if the courts are conceded the power, then a convict, accepting and abiding by the terms of a suspension, is entitled to consideration. Whether he has a right to the continuance of its operation becomes a matter of somewhat formal judicial determination if he is molested. Caprice or arbitrariness cannot work to his disadvantage for he has a right to invoke judicial discretion.

State vs. Ady, 43 N. J. L., 113;
State vs. Hilton, 151 N. C., 687.

Concluding, it would seem that the powers of a court compelled to deal with criminality at first hand are to be construed in the light of what DeQuiros calls "the new horizons of criminal law," which "to serve with the best of his ability" is the duty of everyone. If courts in the days of Hale and Blackstone were recognized to enjoy such powers as inherent to serve the individual only, why should not the same be conceded to the same sort of courts now, for public service through the individual in the encouragement to him to mount to higher ground as a factor of society?

When juries learn that what DeQuiros terms the "kind of modern dosimetry which offers the same remedy for every crime and for every delinquent, varying only in quantity" has been replaced by a treatment of the particular case in an effort to adapt remedies to the circumstances about and concerning an individual, that society may be benefited as he is helped, then sympathetic verdicts will become rare.

It is our experience that more acquittals result from sympathy than from failure of necessary evidence. A year ago a man under twenty-one, but with the responsibilities of a wife and infant upon him, faced a jury in respondent's court upon a charge of larceny of a parcel-post package at the railway station where he was employed. It was impossible to keep the elements of sympathy out of the case. The anxious wife and helpless infant were in evidence with appealing force in spite of anything the court could legitimately do. We know, from what the jurors subsequently said, that conviction, upon circumstantial evidence alone, resulted most largely from the jury's belief that the court would probably suspend a sentence over the defendant. The psychological effect of an acquittal through sympathy upon a moral character yet weak from undevelopment or otherwise, may have, as

predominant, a direction towards reducing the offender's power of resistance; on the other hand conviction, coupled with the strength gained from the assurance that in spite thereof, confidence in the offender's elementary integrity is not lost, has an effect almost inevitable towards moral rehabilitation. Events since this incident seem to us to fully justify the court's position therein, and here maintained.

While we cannot yet endorse all of the conclusions of the gifted Spaniard from whom we quote,* we do believe that the time is here when "forms that cause human dignity to suffer or submit it to shame and insult" should be the very last resort, to be adopted only when the controling object of punishment, the administering of justice upon the individual for the benefit of society whose conventions he shatters, cannot be otherwise attained.

Conceding the right of the Attorney General to question the action of respondent in the matter before the court and accepting the issue gladly for whatever may be the result in settling a question which now is often the cause of undignified judicial practice, we cannot repress the feeling that his circular of January 30, 1915, asked the federal *nisi prius* judiciary to take a decidedly backward step. It is also a matter of regret that, for reasons already given, respondent has not had the means to command that full presentation of the question which is desired.

Respectfully submitted,

John M. Killits

District Judge, Northern District of Ohio,
Respondent.

NOVEMBER 30, 1915.

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*"Modern Theories of Criminality" (pp. 240, 241).

IN THE

SUPREME COURT OF THE UNITED STATES

No. 12 Original.

EX PARTE THE UNITED STATES,

Petitioner.

SUPPLEMENTAL BRIEF

EDWIN J. MARSHALL,
Counsel for Respondent.

TOLEDO, OHIO, JANUARY 18, 1916.

Merry Robbers of the Skies
THE ACADEMY LEGAL OUTLET & RESOURCE CO.

In the Supreme Court of the United States

No. 14 Original.

EX PARTE THE UNITED STATES,

Petitioner.

SUPPLEMENTAL BRIEF.

Because of the general interest in this case, and the desire of the respondent and his counsel to present it as fully as possible, permission is asked to file this supplemental brief.

First as to proof of the facts showing the exercise of the power in question.

The facts are peculiarly within the knowledge of the Department of Justice in that a search of the court records will disclose the extent of the exercise of this power.

The respondent cannot be expected, in a case of this nature, to search every record of every court, at his own expense, so as to present the facts to this court, but he has based the statements, as to the practice set forth in his response, upon letters to him from district judges throughout the United States. The facts alleged as to the exercise of the power in Ohio and Michigan federal courts were based upon a careful search of the court records at Detroit, Toledo, Cleveland, Columbus and Cincinnati, back to 1850.

Court records in New York state courts show the exercise of the power before 1820.

If this court shall hold it cannot take judicial notice of the practices of trial courts, or if the facts stated in the respondent's answer cannot be accepted as fairly showing the extent and course of the practice, then the respondent desires an opportunity to show the facts in such manner as this court may consider proper.

Respondent suggests that the facts may be shown by letters from judges and clerks of courts, and if the Department of Justice insists upon formal proof, it should undertake a comprehensive search of the records of the courts.

A search of the records of the Federal Courts will, without doubt, show how general and uniform the practice has been for the past sixty years or more and its origin may be developed.

The burden of showing the exact facts, if it becomes necessary to have exact facts, would seem to be on the Department of Justice rather than on the respondent.

If the proofs shall fail to show the exercise of this power at common law and a continuous and uniform use of the power since the earliest times, it is submitted, a proper expansion or development of the common law power will be shown.

By submitting the case on briefs and oral argument, the respondent did not intend to waive the right to show the facts as to history and extent of this practice, if this court shall hold such proof to be necessary to a determination of this case.

Next as to the law of Ohio. The Government has cited a decision by Judge Kinkead of the Franklin County Common Pleas Court and claims the practice

is unsettled in Ohio, notwithstanding the Weber and Whiting cases.

In respondent's personal memorandum (pp. 13, 14, 15) it is shown from the record of the Whiting Case (83 Ohio State, 447), how clearly the Supreme Court of Ohio adhered to the principle of the Weber Case, and how surely was the decision of the *nisi prius* Judge Kinkead at variance with the court of last resort of his state.

The situation in Ohio is further shown by an opinion of its Attorney General under date of July 12, 1915 (2 Department Reports of Ohio, 1030), from which the following is quoted:

> "Therefore in the light of this decision (*State vs. Whiting*) and until it is overruled by the Supreme Court, I am compelled to advise you that, notwithstanding the plain provisions of Section 13706 *et seq.* of the General Code, the court has inherent power to suspend the sentence of the defendant in question. The entry should show that the suspension is made under the inherent power of the court and not under the statute."

The case of *State ex rel. vs. Beacom,* 66 O. S., 491, 508 (1902), is cited to show a civil case in which execution of judgment was suspended as in the interest of the public. Mr. Justice Day will be familiar with the conditions which lead up to the decision in the Beacom case.

The case of *United States vs. Birdsall,* 233 U. S., 223 (1914), is cited to show the conviction of a defendant for bribing an officer to induce a judge to suspend a sentence (206 Federal, 816). It is difficult to see how a conviction could be sustained if the suspension of sentence was void.

In conclusion it is submitted the custom and practice of our federal courts for a very long time, at the

least during the past sixty years, is of so high authority that it should not be overturned without better proof, than has been tendered, that it is lacking the foundation necessary to make it legal.

If the Attorney General is convinced that the practice leads to bad results or, notwithstanding its many years of use, may lead to bad results, in view of the long existence of the practice, perhaps he, rather than the respondent, should seek the aid of Congress.

We have never contended that the power is inherent beyond the power of the Legislature to limit its exercise as the power to punish for contempt in *facie curiae* is inherent in the courts, but that it is one which abides in an inferior court under the Constitution, as a common-law incident of jurisdiction, until clearly modified or abated by specific legislation.

In distinction from the inherent power over contempt (*U. S. vs. Hudson,* 7 Cranch, 32), it is a power which may be dispensed with as not essential to the existence of the court.

The respondent did not intend to waive the right to show the facts as to the history and extent of this practice, if this court shall hold such proof to be necessary to a determination of this case.

The respondent has shown, if the court accepts his return, and will show if the court requires, better proof than the admissions of fact in the Government's reply to the respondent's return, that there has been a somewhat general and long-continued practice to which both law-makers and citizens have become adjusted, a practice which commends itself when a "Government is a practical affair, intended for practical men;" and it is submitted such weight should now be given to this usage, practice or custom in determining the existence

of the power that the Government should carry the burden to defeat it, not the respondent to defend it. (*U. S. vs. Mid-West Oil Company,* 236 U. S., 459, 472.)

Respectfully submitted,

EDWIN J. MARSHALL,
Counsel for Respondent.

TOLEDO, OHIO, JANUARY 18, 1916.

EX PARTE UNITED STATES, PETITIONER.

PETITION FOR WRIT OF MANDAMUS.

No. 11, Original. Argued January 10, 11, 1916.—Decided December 4, 1916.

Mandamus, out of this court, is a proper remedy for enforcing a criminal sentence where the District Court which passed it has defeated its execution by an *ultra vires* order of suspension.

The proceeding should be directed to the District Judge, with a view to the annulment of the order of suspension; not to the clerk with a view to the issuance of a commitment in spite of it.

An accused person was duly sentenced in a District Court of the United States pursuant to an act of Congress, and the court then immediately made an order that execution of the sentence be suspended "during the good behavior of the defendant," the effect of which, if sustained, would have been to exempt him permanently and absolutely from the punishment provided by the act and reflected in the sentence. *Held*, that such a suspension—the legal equivalent of an absolute and permanent refusal to impose any sentence under the statute—was beyond the power of the court.

The Constitution assigns to the legislature the power to enact laws defining crimes and fixing the degree and method of punishment; to the judiciary the power to try offenses under those laws and impose punishment within the limits and according to the methods therein provided; to the executive the power to relieve from the punishment so fixed by law and so judicially ascertained and imposed.

The power of Congress to fix punishment for crime includes the power, by probation or other suitable legislation, to equip the courts in advance with such latitude of discretion as will enable them to vary and control the application of punishment to suit the exigencies of each case, in accord with obvious considerations of humanity and public well-being;

But the courts, albeit under the Constitution they are possessed inherently of a judicial, discretionary authority which is ample for the wise performance of their duties in the trying of offenses and imposing of penalties as the laws provide, have no inherent constitutional power to mitigate or avert those penalties by refusing to inflict them in individual cases.

Semble, that, at common law, while the courts exercised a discretion to suspend either imposition or execution of sentence temporarily for purposes and in ways consistent with the due enforcement of the penal laws, so as to facilitate action by the pardoning power and avoid miscarriages of justice, they neither possessed nor claimed the power of permanent refusal to enforce them.

In weight and reason the decisions of the state courts deny the power of suspension here in question.

The order of suspension, being essentially unconstitutional, may not be sustained because it accords with a practice (of long standing though intermittent and not universal) indulged for the highest motives by many federal judges in Ohio and elsewhere.

The hardships and wrongs resulting from this practice and its annulment address themselves to the pardoning power; the evils which the practice was designed to avoid may be remedied for the future by appropriate legislation.

Under the exceptional circumstances of the case, this court, exercising its discretion, to the end that ample time may be afforded for executive clemency or such other action as the situation may require, directs that the writ of mandamus do not issue until the end of the term, unless earlier requested by the United States.

UPON application of the Government, presented by the Attorney General, a rule was made upon Honorable John M. Killits, Judge of the District Court of the United States for the Northern District of Ohio, directing that he show cause why a writ of mandamus should not issue requiring him to set aside the order described in the opinion. The case was heard upon the Government's

petition, the respondent's return, and the Government's reply. The facts are stated in the opinion.

The Attorney General and *Mr. Assistant Attorney General Wallace*, with whom *The Solicitor General* was on the briefs, for the United States:

It is the function of the judiciary to hear and determine cases and enforce determination by judicial process. The District Courts and Judges derive their power from the Constitution and the acts of Congress and from them alone. Article III, § 2, limits it to "cases" and "controversies." Federal judges are sworn to "administer justice" (Rev. Stat., § 712); and many sections of the Revised Statutes and the Judicial and Penal Codes prove by plain words that Congress expects the court and judge to hear and determine, and enter final judgments, and to carry those judgments into effect. The penal laws are mandatory. In varying expression they prescribe that punishment *shall* be inflicted. This direction is not obeyed until the punishment has been actually enforced.

The power to pardon, including the power to reprieve or commute, belongs to the Executive alone. *United States* v. *Klein*, 13 Wall. 128; *Ex parte Wells*, 18 How. 307; *Ex parte Garland*, 4 Wall. 333. *The Laura*, 114 U. S. 411, concerns only fines. If the power here in question appertain to the pardoning power, it cannot belong to the court; if it be not a power of pardon, the court could only acquire it through act of Congress or common law. See Blackstone, Tucker's ed., Book IV, ch. xxxi, p. 397. Congress has never attempted to bestow such a power on the District Courts or Judges. It has merely conferred a limited power of parole on judges in the District of Columbia (36 Stat. 864). If it had ever meant to confer so wide a power, it would have said so plainly. There are laws which provide for stay of execution on fines and

penalties in certain specific instances; for avoiding indefinite imprisonment on account of fines and costs; for motions for new trials, motions in arrest of judgment, and writs of error. Otherwise, the federal statutes evince a plain intention that sentence must be prompt and execution likewise.

Section 722 of the Revised Statutes, even if applicable to supply power, only operates where the federal laws are deficient in details. And the common law, as modified, may only be resorted to under that section to govern in the disposition of the case and the infliction of punishment. To resort to the local law for means to avoid inflicting punishment would offend § 722 as well as the related federal laws generally. But even if resort were to be had to the common law as modified, there is neither a common law nor any statute of Ohio conferring the power here involved. Courts have inherent power to suspend sentence while awaiting determination of some question upon the event of which depends the legal propriety of enforcing sentence, this being essential to due administration of the law. Arbitrary, capricious or indefinite suspension, on the other hand, destroys the due administration of the law, and transcends all inherent power. *Cf. Kendall* v. *United States*, 12 Pet. 524; *Porto Rico* v. *Rosaly*, 227 U. S. 270; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 479. A capricious suspension of the imposition of sentence is essentially a nonjudicial act, for it leaves the convict enjoying all his civil rights as well as immunity from punishment. Though in a less degree, the same is true of a capricious suspension of execution. Each, in effect, involves an exercise of the pardoning power; for while civil rights are not preserved or restored by a suspension of execution, no more are they by a commutation of sentence by the President. Of course, if a judge (after sentence and commitment) were to grant a parole under authority of some valid act of Congress, he would then

be enforcing the law, because the parole would be a statutory element of every punishment.

This court has frequently intimated that it does not consider it an inherent power of federal courts to capriciously stay proceedings upon their judgments or sentences. *Ex parte Gordon*, 1 Black, 503; *United States* v. *Mayer*, 235 U. S. 55.

In *Pointer* v. *United States*, 151 U. S. 396, the question whether authority existed to suspend sentence indefinitely was mooted but not decided. The common law did not allow it, and in this country the reasoning and the great weight of the state decisions condemn it.

The contrary state decisions are based on misconceptions of the common law or for other reasons are unsatisfactory. They relate almost entirely to delays in imposing sentence rather than suspension of execution. Of the cases usually referred to as supporting the power [citing decisions from New York, Michigan, New Jersey, New Hampshire, North Carolina, Florida, Massachusetts, Maine, California, Pennsylvania and Ohio] all save *Weber* v. *State*, 58 Ohio St. 616, and *State* v. *White*, 117 N. Car. 806, involve only postponement of the imposition of sentence. The expression in *Weber* v. *State*, *supra*, is a *dictum*.

Even a decision by the Ohio court would not bind this court upon a question of inherent or common-law powers. See Wells on Jurisdiction of Courts, §§ 208, 304; *Smith* v. *Alabama*, 124 U. S. 465; *Ex parte Wells*, 18 How. 310. Further as to the Ohio view see *State* v. *Baker*, 3 Ohio N. P. Rep. N. S. 624; 6 Page & Adams Anno. Ohio General Code, note, § 13698, p. 644; *Sterling* v. *Drake*, 29 Ohio St. 457; *Ohio* v. *Radcliffe* (Ct. Common Pleas, Franklin County), Ohio Law Bulletin, November 15, 1915.

The court may not judicially notice what the lower federal courts have done in similar cases. From the return and reply thereto, however, enough conceded facts

appear to show that (1) the practice never was alike in all parts of the United States; (2) within single States, the practice, in some cases, differed in different districts; (3) within a single district the practice at one period would be one way and at another period the other way; (4) many judges exercised the function without any claim of right other than the right of necessity, some even admitting their lack of power; (5) after 1891 and 1894, respectively, whenever exercised, it was in the face of the *Wilson Case*, 46 Fed. Rep. 748, and the *Pointer Case*, 151 U. S. 396, 420; and (6) it was always done in the face of statutes prescribing the punishment for crimes, and the established principle of public policy that offenders against the law should suffer its penalties. This practice being neither general nor consistent nor conformable to statutes or constitution, cannot be considered. *United States* v. *Buchanan*, 8 How. 82; *Thompson* v. *Riggs*, 5 Wall. 663; *United States* v. *Macdaniel*, 7 Pet. 1; *Basey* v. *Gallagher*, 20 Wall. 670. The *Midwest Oil Company Case*, 236 U. S. 459, is readily distinguished.

Humanitarian arguments do not touch the question of power or affect the necessity of preserving the Constitution. Ample relief may be afforded by enlarging the general parole law (36 Stat. 819). Judicial suspension opposes teachings of advanced criminology, with which the Government is in entire sympathy.

The respondent, *Hon. John M. Killits*, in his return to the rule to show cause and in a memorandum prepared by him in support thereof claimed: That the power of the court may be exercised broadly either by deferring the imposition or suspending the execution of sentence if such step seems consonant with the best interests of society—as where the minimum penalty named in a statute is disproportionate to the criminality involved in the particular offense, or where the law may be vindicated

and the individual saved, consistently. In a detailed statement, accompanied by much argument and illustration, the benefits accruing from the practice, in convenience of administration, in justice to the offender, and in the upbuilding of society, were eloquently set forth, together with reasons for believing that no adequate substitute may be provided.

In discussing the question in its legal and constitutional aspects, he dwelt particularly upon the practice of many federal courts and judges and the acquiescence of the Government generally. Also upon the common law and the practice in Ohio.

Local practice is significant of the common-law power. In Ohio the inherent power of the state court to suspend execution is no longer open to question. *Weber* v. *State*, 58 Ohio St. 616; *State* v. *Whiting*, 83 Ohio St. 447. In all discussion of the subject, judicial and lay, it is conceded that the power in both aspects existed in the common-law courts in 1787. See 49 American Law Review, 709, 713; *Gehrmann* v. *Osborne*, 79 N. J. Eq. 430, 441.

Mr. Edwin J. Marshall for respondent:

The power existed at common law. Hale's Pleas of the Crown, Vol. I, pp. 367, 19, 26; Vol. II, pp. 412, 401, 309, 35; Hawkins' Pleas of the Crown, Vol. II, ch. 51, § 8; ch. 33, § 144; ch. 6, § 8; ch. 15, §§ 40, 65; 1 Chitty's Crim. Law, ch. xix, p. 757; 2 Dyer, 235a; 2 Dyer, 205a; 2 Dyer, 165a. Although these authorities, confessedly, leave in some doubt whether indefinite suspension was a common-law power, they tend strongly to uphold it. Reprieves were either *ex arbitrio judicis* or *ex necessitate legis*. The latter covered all cases now dealt with by temporary suspensions, as for insanity, pregnancy, etc. The former seem to have applied whenever it appeared that injustice would result from conviction or execution. This power was an implied common-law exception to the statutory

duty to punish. Courts reprieved before and after judgment, to allow opportunity to apply for pardon and for other reasons inconsistent with a strict and invariable duty to punish. If sentences could be suspended for limited times in avoidance of injustices, why not indefinitely? Hale says reprieves were granted after conviction of small felonies as well as on capital convictions, and the cases in Dyer show that the justices controlled the execution of judgments. See further *Queen* v. *Richardson*, 8 Dowling's Practice Cases, 511 (1840); *Regina* v. *Ryan*, 7 Cox Crim. Cas. 109 (1855); 9 American Law Review, 600 (1875); *King* v. *Inhabitants of Wandsworth*, 1 Barn. & Ald. 63 (1817); *Rex* v. *Inhabitants of Southampton*, 2 Chitty, 215 (1818). But see also *King* v. *Inhabitants of the County of Oxford*, 13 East. 411 (1811). The power might have had its origin in the "law of nature" conception (Blackstone Comm., Intro., § 2). It is consistent with the duty to "administer justice." While modern decisions, based on these common-law authorities, disagree in their interpretations (see *Gehrmann* v. *Osborne*, 79 N. J. Eq. 430 (1911); *People ex rel. Forsyth* v. *Court of Sessions*, 141 N. Y. 288 (1894)), long and continuous exercise by state and federal judges affords the best reason for believing that the power existed at common law. *State* v. *Crook*, 115 N. Car. 760 (1894). The exercise may have been common in England and yet no records made in the ancient reports, just as it has been frequent here in the federal practice though evidenced by barely a reported case.

Analysis of the decisions of the various States and Territories shows that some courts affirm the power broadly, others only as to imposition of sentence, others deny it *in toto*, and some, while they disown it in words, have applied it indirectly where justice demanded. Some base the denial on the executive power of pardon. The distinction between the power to delay imposing sentence and the power to suspend execution is illusory in reason,

and not recognized at common law. Many state decisions uphold the one power and some uphold the other also. The following cases in this court have some bearing: *United States* v. *Pile*, 130 U. S. 280; *Pointer* v. *United States*, 151 U. S. 396; *Ex parte Wells*, 18 How. 307; *United States* v. *Wilson*, 7 Pet. 150; *Whisky Cases*, 99 U. S. 594; *Nobles* v. *Georgia*, 168 U. S. 398. The power was exercised in *United States* v. *Gilbert*, Fed. Cas. No. 15,205; and (in principle) in *United States* v. *Blaisdell*, 3 Benedict, 132.

If the power does not exist in the courts, by parity the District Attorneys may not *nolle* indictments, the courts may not impose concurrent sentences, and neither may grant immunity to accomplices who testify. None of these court powers is derived from statute. All rest on practice and general acquiescence and the judicial duty to administer justice with humanity. If it be true that the power of suspension was limited at common law, it has grown with the changes in our institutions, and in our attitude toward the criminal. Its origin was judicial, not regal, as some courts say. In either event it inheres in the common-law conception of "courts," intended when that word appears in constitution and statute. If the practice has become a custom, the custom may become law even to the enlargement of judicial powers through its influence on the construction of statutes. The acquiescence of the executive and legislative branches, and the great evils which this power alone can properly mitigate, should be considered.

The power is inherent in the federal courts. The word "courts" in the Constitution carries the power if it existed at common law. That law (perhaps as modified) grafts the exception on all statutes imposing penalties. See also Rev. Stat., § 722. If not inherent, it is at least part of the courts' equipment until withdrawn by statute. *Howard* v. *United States*, 75 Fed. Rep. 986; *In re Henry*, 123 U. S. 372. In no other way these courts have acquired

power to impose concurrent sentences. *United States* v. *Patterson*, 29 Fed. Rep. 775; *Kirkman* v. *McClaughry*, 152 Fed. Rep. 255; *Ex parte Peake*, 144 Fed. Rep. 1016. Where Congress is silent federal courts are under common-law rules in administering criminal law. *Howard* v. *United States*, 75 Fed. Rep. 986; *United States* v. *Nye*, 4 Fed. Rep. 888; *Erwin* v. *United States*, 37 Fed. Rep. 470; *United States* v. *Maxwell*, 3 Dill. 275. [See also *United States* v. *Reid*, 12 How. 361, 365, and *Withaup* v. *United States*, (C. C. A.) 127 Fed. Rep. 530. REPORTER.] The power to *nolle* comes in the same way.

The continuous exercise amounts to a construction of the federal statutes supporting the power. *Stuart* v. *Laird*, 1 Cranch, 299; *McKeen* v. *Delancy's Lessee*, 5 Cranch, 22; *Fairbank* v. *United States*, 181 U. S. 283; *The Laura*, 114 U. S. 411; *Bank of United States* v. *Halstead*, 10 Wheat. 51; *Atkins* v. *Fiber Disintegrating Co.*, 18 Wall. 272, and other cases. The same principle sustains developments of the practice, for, if practice can construe, it may also modify the constructions of, the statutes.

There is no intrusion on the pardoning power. The two powers, judicial and regal, existed at common law and we inherited the duality. *Ex parte Wells*, 18 How. 307; *United States* v. *Wilson*, 7 Pet. 150. Civil disabilities are not removed by the court's action. *People ex rel. Forsyth* v. *Court of Sessions*, 141 N. Y. 288; *People* v. *Stickle*, 156 Michigan, 557; *Spencer* v. *State*, 125 Tennessee, 64; *State* v. *Addy*, 43 N. J. L. 113. The two powers are harmonious. All branches of the Government have acquiesced. *Brown* v. *Walker*, 161 U. S. 591, holds that general amnesty laws are allowable, and *The Laura*, 114 U. S. 411, that fines and penalties may be remitted by subordinate officers under sanction of statute and long practice and acquiescence.

The defendant may even have a right to a suspension of sentence to apply for a pardon. *Ex parte Wells*, 18

How. 307; *Allen* v. *State*, Martin & Yerger, 294; *Crane* v. *State*, 94 Tennessee, 98; *State* v. *Chitty*, 1 S. Car. (Bailey) 379; *State* v. *Abbott*, 87 S. Car. 466. It then becomes a judicial duty to suspend sentence until pardon is refused.

By leave of court, a memorandum was submitted by the *New York State Probation Commission*, and a brief explaining and supporting the practice in the First Circuit, by *Mr. Richard W. Hale* and *Mr. Frank W. Grinnell.*

Mr. Chief Justice White delivered the opinion of the court.

The accused pleading guilty to an indictment charging him in several counts with embezzling the money of a national bank of which he was an officer and making false entries in its books in violation of § 5209, Revised Statutes, was sentenced to imprisonment in the penitentiary for five years, the shortest term which under the statute could have been imposed upon him. At once at his request over the objection of the United States District Attorney the court ordered "that the execution of the sentence be, and it is hereby suspended during the good behavior of the defendant, and for the purpose of this case this term of this court is kept open for five years." The United States moved to set this order aside on the ground that as it was not a mere temporary suspension of the sentence to enable legal proceedings pending or contemplated to revise it to be taken, or application for pardon to be made, or any other legal relief against the sentence to be resorted to, but on the contrary as it was a permanent suspension based upon considerations extraneous to the legality of the conviction or the duty to enforce the sentence, the order of suspension was void as it was equivalent to a refusal to carry out the statute. The motion was denied. In the opinion giving its reasons for so doing the court, conceding that the suspension was permanent, stated the

general considerations which it deemed it was required to take into view in deciding whether the sentence should be enforced, conceding the legality of the conviction and sentence and their finality, as follows:

"Modern notions respecting the treatment of law breakers abandon the theory that the imposition of the sentence is solely to punish, and now the best thought considers three elements properly to enter into the treatment of every criminal case after conviction. Punishment in some measure is still the object of sentence, but affecting its extent and character we consider the effect of the situation upon the individual as tending to reform him from or to confirm him in a criminal career, and also the relation his case bears to the community in the effect of the disposition of it upon others of criminal tendencies."

After pointing out the peculiar aptitude possessed by a trial judge for the appreciation of such conditions and the imperative duty which rested upon such judge to consider and weigh the matters stated and to determine as an inherent attribute of judicial power whether a permanent suspension of the term of imprisonment fixed by the statute should be ordered, the circumstances upon which it was concluded that a permanent suspension should be directed were stated in part as follows:

"We took into account the peculiar circumstances under which his crime was committed, having regard to the temptations which from time to time encompassed him, and his personal necessities, and the purposes for which his appropriations were made. Also, the fact that his friends made his employers whole, and that otherwise he had so commended himself to the favor of his employers suffering by his crime, that they at all times as well as now evince a disposition to forgive his abuse of their confidence, and to support him against the punishment which the law provides. We find that otherwise than for this crime, his disposition, character and habits have so strongly com-

mended him to his friends, acquaintances and persons of his faith, that they are unanimous in the belief that the exposure and humiliation of his conviction are a sufficient punishment, and that he can be saved to the good of society if nothing further is done with him."

After further elaborating considerations of a like nature and stating very many circumstances confirming those mentioned, to leave no room for doubt that its action was intended to be permanent and was based alone on the extraneous circumstances stated, the court said:

"Passing now to the concrete case, we observe for the benefit of the United States that nothing exists in this case which moved the court to suspend the execution of sentence to prevent 'an abuse of the court's process, or to prevent an injustice being done to the defendant' so far as it may be said that abstract justice required defendant to suffer for his crime. However, we considered the defendant from many standpoints to be as worthy of the benefit of the discretion to suspend the execution of his sentence as any other convict upon whom that favor has hitherto been bestowed."

Following a written demand which was thereafter made upon the clerk to issue a commitment which was refused by him on the ground that the sentence had been suspended and the further refusal of the judge to direct the clerk to issue such commitment, the United States sought and obtained a rule to show cause why a mandamus should not be awarded directing the judge to vacate the order of suspension, under which the subject is now before us for consideration.

The remedial appropriateness of the writ of mandamus is at the threshold questioned, but we dispose of the subject by a mere reference to adjudged cases conclusively establishing the want of foundation for the contention. *Ex parte Bradley*, 7 Wall. 364; *Life & Fire Insurance Company* v. *Wilson*, 8 Pet. 291; *In re Winn*, 213 U. S.

458; *In re Metropolitan Trust Co.*, 218 U. S. 312; *Ex parte Metropolitan Water Company*, 220 U. S. 539. In addition, however, it is urged that as the right to resort to the extraordinary remedy by mandamus must rest upon the assumption that the order of suspension was absolutely void, therefore the rule for the writ should have been directed not against the judge, but against the clerk to compel him to issue the commitment. But we pass from its consideration, as we are of opinion that its want of merit will be completely demonstrated by the slightest appreciation of the judicial duties of the court below and the ministerial relation of the clerk of the court to the same.

The return to the rule and the statement in support of the same lucidly portray the contentions involved in the question of power to be decided and the subject in all its aspects has been elaborately discussed, not only by the printed arguments of the parties, but in addition light has been thrown on the general question by an argument submitted by the New York State Probation Commission, explaining the statutory system of parole prevailing in that State, and by an able argument presented by members of the Bar of the First Circuit in behalf of a practice of mitigating or pretermitting, when deemed necessary, the statutory punishment for crimes which it is declared has prevailed in the United States courts in that circuit for many years.

The argument on behalf of the respondent concedes that the order of suspension was permanent and absolutely removed the accused from the operation of the punishment provided by the statute; and it is further conceded that a suspension of this character was the equivalent of an absolute and permanent refusal to impose under the statute any sentence whatever. However absolute may be the right thus asserted, it is nevertheless said it is not without limitation, since it may not be capriciously called

into play. Passing the question whether this assumed restriction is not in the nature of things imaginary as the result of the scope of the authority asserted, let us come to dispose of the contention made by examining the propositions relied upon to sustain it.

They are: 1. That the right to refuse to impose a sentence fixed by statute or to refuse to execute such a sentence when imposed, is a discretion inhering in the judicial power to try and punish violations of the criminal law. 2. That even if there be doubt on this subject as an original proposition, such doubt is dispelled as the right was recognized and frequently exerted at common law. 3. That the power claimed has also been recognized by decisions of state courts and of United States courts of original jurisdiction to such an extent that the doctrine is now to be considered as not open to controversy. 4. That whatever may be the possibility of dispute as to this last view, at least it cannot be denied that in both the state and federal courts, over a very long period of time, the power here asserted has been exercised often with the express, and constantly with the tacit, approval of the administrative officers of the state and federal governments, and has been also tacitly recognized by the inaction of the legislative department during the long time the practice has prevailed, to such an extent that the authority claimed has in practice become a part of the administration of criminal law both state and federal, not subject to be now questioned or overthrown because of mere doubts of the theoretical accuracy of the conceptions upon which it is founded.

1. *The contention as to inherent judicial power.*

Indisputably under our constitutional system the right to try offences against the criminal laws and upon conviction to impose the punishment provided by law is judicial, and it is equally to be conceded that in exerting the powers vested in them on such subject, courts inherently possess

ample right to exercise reasonable, that is, judicial, discretion to enable them to wisely exert their authority. But these concessions afford no ground for the contention as to power here made, since it must rest upon the proposition that the power to enforce begets inherently a discretion to permanently refuse to do so. And the effect of the proposition urged upon the distribution of powers made by the Constitution will become apparent when it is observed that indisputable also is it that the authority to define and fix the punishment for crime is legislative and includes the right in advance to bring within judicial discretion, for the purpose of executing the statute, elements of consideration which would be otherwise beyond the scope of judicial authority, and that the right to relieve from the punishment, fixed by law and ascertained according to the methods by it provided, belongs to the executive department.

The proposition might well be left with the demonstration which results from these considerations, but the disregard of the Constitution which would result from sustaining the proposition is made if possible plainer by considering that, if it be that the plain legislative command fixing a specific punishment for crime is subject to be permanently set aside by an implied judicial power upon considerations extraneous to the legality of the conviction, it would seem necessarily to follow that there could be likewise implied a discretionary authority to permanently refuse to try a criminal charge because of the conclusion that a particular act made criminal by law ought not to be treated as criminal. And thus it would come to pass that the possession by the judicial department of power to permanently refuse to enforce a law would result in the destruction of the conceded powers of the other departments and hence leave no law to be enforced.

2. *The contention as to support for the proposition at common law.*

The common law is thus stated in Hale's Pleas of the Crown, vol. 2, chap. 58, p. 412:

"Reprieves or stays of judgment or execution are of three kinds, viz:

"I. *Ex mandato regis.* . . .

"II. *Ex arbitrio judicis.* Sometimes the judge reprieves before judgment, as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment insufficient, or doubtful whether within clergy; and sometimes after judgment, if it be a small felony, tho out of clergy, or in order to a pardon or transportation. Crompt. Just. 22, b. and these arbitrary reprieves may be granted or taken off by the justices of gaol-delivery, altho their sessions be adjourned or finished, and this by reason of common usage. Dy. 205 a.

"III. *Ex necessitate legis*, which is in case of pregnancy, where a woman is convict of felony or treason."

Blackstone thus expresses it:

"The only other remaining ways of avoiding the execution of the judgment are by a reprieve or a pardon; whereof the former is temporary only, the latter permanent.

"I. A reprieve, from *reprendre*, to take back, is the withdrawing of a sentence for an interval of time; whereby the execution is suspended. This may be, first, *ex arbitrio judicis;* either before or after judgment; as, where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offence be within clergy; or sometimes if it be a small felony, or any favourable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their session be finished, and their commission expired: but this rather by common usage, than of strict right.

"Reprieve may also be *ex necessitate legis:* as, where a woman is capitally convicted, and pleads her pregnancy; though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered. This is a mercy dictated by the law of nature, *in favorem prolis.*" (Book IV, ch. xxxi, pp. 394–395.)

While it may not be doubted under the common law as thus stated that courts possessed and asserted the right to exert judicial discretion in the enforcement of the law to temporarily suspend either the imposition of sentence or its execution when imposed to the end that pardon might be procured or that a violation of law in other respects might be prevented, we are unable to perceive any ground for sustaining the proposition that at common law the courts possessed or claimed the right which is here insisted upon. No elaboration could make this plainer than does the text of the passages quoted. It is true that, owing to the want of power in common law courts to grant new trials and to the absence of a right to review convictions in a higher court, it is we think to be conceded: (a) That both suspensions of sentence and suspensions of the enforcement of sentence, temporary in character, were often resorted to on grounds of error or miscarriage of justice which under our system would be corrected either by new trials or by the exercise of the power to review. (b) That not infrequently, where the suspension either of the imposition of a sentence or of its execution was made for the purpose of enabling a pardon to be sought or bestowed, by a failure to further proceed in the criminal cause in the future, although no pardon had been sought or obtained, the punishment fixed by law was escaped. But neither of these conditions serves to convert the mere exercise of a judicial discretion to temporarily suspend for the accomplishment of a purpose contemplated by law into the existence of an arbitrary judicial power to permanently refuse to enforce the law.

And we can deduce no support for the contrary contention from the rulings in 2 Dyer, 165a, 205a and 235a, since those cases but illustrate the exercise of the conceded, reasonable, discretionary power to reprieve to enable a lawful end to be attained. Nor from the fact that common law courts possessed the power by recognizances to secure good behavior, that is, to enforce the law, do we think any support is afforded for the proposition that those courts possessed the arbitrary discretion to permanently decline to enforce the law. The cases of *Rex* v. *Hart*, 30 How. State Trials, 1344, and *Regina* v. *Dunn*, 12 Q. B. 1026, 1041, certainly do not tend to so establish, since they simply manifest the exertion of the power of the courts after a conviction and the suffering of the legal penalty to exact from the convicted person a bond for his good behavior thereafter.

3. *The support for the power asserted claimed to be derived from the adjudication of state and federal courts.*

Coming first to the state courts, undoubtedly there is conflict in the decisions. The area, however, of conflict will be narrowed by briefly stating and contrasting the cases. We shall do so by referring chronologically to the cases denying the power, and then to those relied upon to establish it.

In 1838 the Supreme Court of North Carolina in *State* v. *Bennett*, 4 Dev. & Battle's Law, 43, was called upon to decide whether a trial court had the right to permanently remit upon condition a part of a criminal sentence fixed by statute. The court said:

"We know that a practice has prevailed to some extent of inflicting fines with the provision that they should be diminished or remitted altogether upon matter thereafter to be done, or shown to the Court by the person convicted. But we can find no authority in law for this practice, and feel ourselves bound, upon this first occasion when it is brought judicially to our notice, to declare it illegal."

In 1860 in *People* v. *Morrisette*, 20 How. Pr. 118, an accused after pleading guilty asked a suspension of sentence and to be then discharged from custody. The court said:

"I am of the opinion the court does not possess the power to suspend sentence indefinitely in any case. As I understand the law, it is the duty of the court, unless application be made for a new trial, or a motion in arrest of judgment be made for some defect in the indictment, to pronounce judgment upon every prisoner convicted of crime by a jury, or who pleads guilty. An indefinite suspension of the sentence prescribed by law is a quasi pardon, provided the prisoner be discharged from imprisonment. No court in the state has any pardoning power. That power is vested exclusively in the governor."

In *People* v. *Brown*, 54 Michigan, 15, in deciding that no power to permanently suspend a sentence existed, speaking through Mr. Chief Justice Cooley, the court said:

"Now it is no doubt competent for a criminal court, after conviction, to stay for a time its sentence; and many good reasons may be suggested for doing so; such as to give opportunity for a motion for a new trial or in arrest, or to enable the judge to better satisfy his own mind what the punishment ought to be: *Commonwealth* v. *Dowdican's Bail*, 115 Mass. 133; but it was not a suspension of judgment of this sort that was requested or desired in this case; it was not a mere postponement; it was not delay for any purpose of better advising the judicial mind what ought to be done; but it was an entire and absolute remission of all penalty and the excusing of all guilt. In other words, what was requested of the judge was that he should take advantage of the fact that he alone was empowered to pass sentence, and, by postponing indefinitely the performance of this duty indirectly but to complete effect grant to the respondent a pardon for his crime."

And, considering the doctrine as to the want of power

thus expounded from the point of view of the common law and of every argument here relied upon, state courts have in the cases which are in the margin in careful opinions denied the existence of the power now claimed.[1]

The cases to the contrary are these, omitting one in a court of original jurisdiction in Massachusetts referred to by counsel but in which there is no written opinion:

In 1874 in *Commonwealth* v. *Dowdican's Bail*, 115 Massachusetts, 133, the right in a criminal case "to lay the case on file" and postpone the sentence was sustained, the court declaring that the practice had long existed, and was recognized by statutes one of which regulated the granting of parole by courts in liquor cases.

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[1] *People* v. *Kennedy*, 58 Mich. 372 (1885); *Gray* v. *State*, 107 Ind. 177 (1886); *People* v. *Blackburn*, 6 Utah, 347 (1890); *State* v. *Voss*, 80 Ia. 467 (1890); *People ex rel. Benton* v. *Court*, 8 N. Y. Crim. Rep. 355 (1892), affirmed in 66 Hun, 550 (1893); *In re Strickler*, 51 Kans. 700 (1893); *People ex rel. Smith* v. *Allen*, 155 Ill. 61 (1895); *In re Markuson*, 5 N. Dak. 180 (1895); *In re Webb*, 89 Wis. 354 (1895); *United States* v. *Folsom*, 8 N. Mex. 651 (1896); *State* v. *Murphy*, 23 Nev. 390 (1897); *Neal* v. *State*, 104 Ga. 509 (1898); *Hawaii* v. *Pedro*, 11 Haw. 287 (1898); *In re Beck*, 63 Kans. 57 (1901); *Miller* v. *Evans*, 115 Ia. 101 (1901); *People* v. *Barrett*, 202 Ill. 287 (1903); *In re Flint*, 25 Utah, 338 (1903); *State* v. *Dalton*, 109 Tenn. 544 (1902); *Grundel* v. *People*, 33 Colo. 191 (1905); *Tuttle* v. *Lang*, 100 Me. 123 (1905); *McCampbell* v. *State*, 116 Tenn. 98 (1905); *Ex parte St. Hilaire*, 101 Me. 522 (1906); *Tanner* v. *Wiggins*, 54 Fla. 203 (1907); *State* v. *Hockett*, 129 Mo. App. 639 (1908); *Ex parte Clendenning*, 22 Okla. 108 (1908); *Ex parte Cornwall*, 223 Mo. 259 (1909); *Wall* v. *Jones*, 135 Ga. 425 (1910); *State* v. *Smith*, 173 Ind. 388 (1910); *State ex rel. Cary* v. *Langum*, 112 Minn. 121 (1910); *Ex parte Peterson*, 19 Ida. 433 (1911); *State* v. *Abbott*, 87 S. Car. 466 (1911); *Spencer* v. *State*, 125 Tenn. 64 (1911); *State* v. *Sapp*, 87 Kans. 740 (1912); *Daniel* v. *Persons*, 137 Ga. 826 (1912); *State* v. *Sturgis*, 110 Me. 96 (1912); *State* v. *Talberth*, 109 Me. 575 (1912); *Fuller* v. *State*, 100 Miss. 811 (1911); *Ex parte Bugg*, 163 Mo. App. 44 (1912); *Snodgrass* v. *State*, 150 S. W. (Texas) 162 (1912); *Roberts* v. *Wansley*, 137 Ga. 439 (1912); *Hancock* v. *Rogers*, 140 Ga. 688 (1913); *Brabandt* v. *Commonwealth*, 157 Ky. 130 (1914); *Ex parte Hart*, 29 N. Dak. 38 (1914); *Reese* v. *Olsen*, 44 Utah, 318 (1914).

The case just cited was approvingly referred to in *Sylvester* v. *State*, 65 N. H. 193, and declared to express the practice long prevailing in New Hampshire.

In 1894, in *People ex rel. Forsyth* v. *Court of Sessions*, 141 N. Y. 288, in holding that a trial court had power to permanently suspend a sentence for reasons dehors the legality of the conviction, it was declared that such power existed at common law and hence prevailed in the State, this being supported by a quotation from Hale's Pleas of the Crown. In addition it was said, referring to a state parole statute enacted subsequent to the conviction, that such statute, while it conferred no new or other power than that possessed at common law, nevertheless imposed the duty to see to it that the power was not lost to impose future punishment after the release if the condition of suspension was violated.

In the cases cited in the margin the power was upheld upon the rulings in *Commonwealth* v. *Dowdican's Bail*, *supra*, and the *Forsythe Case*, *supra*, or because of a practice long prevailing.[1]

Leaving aside the question of the asserted duty to sustain the doctrine because of the long established prac-

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[1] *State* v. *Addy*, 43 N. J. L. 113 (1881); *People* v. *Mueller*, 15 Chicago Legal News, 364 (1883); *Commonwealth* v. *Maloney*, 145 Mass. 205 (1887); *Ex parte Williams*, 26 Fla. 310 (1890); *State* v. *Crook*, 115 N. Car. 760 (1894); *State* v. *Whitt*, 117 N. Car. 804 (1895); *People ex rel. Dunnigan* v. *Webster*, 14 Misc. (N. Y.) 617 (1895); *Weber* v. *State*, 58 Ohio St. 616 (1898); *Shaefer* v. *Ohio*, 7 Ohio Cir. Ct. (N. S.) 292 (1905); *In re Clara Lee*, 3 Ohio N. P. (N. S.) 533 (1905); *State* v. *Hilton*, 151 N. Car. 687 (1909); *State* v. *Drew*, 75 N. H. 402 (1909); *State* v. *Drew*, 75 N. H. 604 (1910); *Ex parte Hinson*, 156 N. Car. 250 (1911); *Gehrmann* v. *Osborne, Warden*, 79 N. J. Eq. 430 (1911); *People* v. *Goodrich*, 149 N. Y. Supp. 406 (1914); *State* v. *Tripp*, 168 N. Car. 150 (1914); *State* v. *Johnson*, 169 N. Car. 311 (1915). See *Green* v. *State*, 88 Ark. 290 (1908); *Joiner* v. *State*, 94 Ark. 198 (1910); *People* v. *Patrich*, 118 Cal. 332 (1897); *Commonwealth* v. *Nuber*, 6 Pa. Super. Ct. Rep. 420 (1898); *Commonwealth* v. *Dunleavy*, 16 Pa. Super. Ct. Rep. 380 (1901).

tice, which we shall hereafter consider, we think it clear that the long and settled line of authority to which we have previously referred denying the existence of the power is in no way weakened by the rulings which lie at the basis of the cases relied upon to the contrary. In the first place, on the face of the opinion in *Commonwealth* v. *Dowdican's Bail*, *supra*, it would seem certain that that case treated the power as being brought by the state legislation which was referred to within the domain of reasonable discretion, since by the effect of that legislation the right to exert such power, if not directly authorized, was at least by essential implication sanctioned by the state law. In the second place, in so far as the *Forsyth Case*, *supra*, is concerned and its declaration as to what was the common law upon the subject, the error thus fallen into is not only demonstrated by what we have said as to the common law, but is additionally shown by the fact that the quotation from Hale's Pleas of the Crown made in the opinion contains clauses supporting the opinion expressed as to the common law when in fact the clauses in question, it would seem, were by some error of citation mistakenly attributed to Hale. We say this because the clauses referred to and attributed to Hale in the quotation are not found in any edition of the Pleas of the Crown which we have been able to examine, and it is stated by counsel for the United States that after diligent search no passage containing the clauses has been discovered, and the existence of any edition of the work containing them is not pointed out by opposing counsel. But whether this be well founded or not, as the conclusion concerning the common law which the case expressed is we think obviously unsound, we are unable on the authority of such a mistaken view to disregard the long established and sound rule laid down in the many state cases which we have quoted.

So far as the courts of the United States are concerned,

it suffices to say that we have been referred to no opinion maintaining the asserted power, and on the contrary in the opinion in the only case in which the subject was considered it was expressly decided the power was wanting. *United States* v. *Wilson*, 46 Fed. Rep. 748 (1891). It is true that in the District of Columbia the existence of the power was maintained. *Miller* v. *United States*, 41 App. D. C. 52 (1913). But the unsoundness of the grounds upon which the conclusion was based is demonstrated by what we have previously said; and aside from this, as the subject was covered by an Act of Congress conferring power of parole (Act of July 25, 1910, 36 Stat. 864), the case requires no further consideration.

4. *The duty to recognize the power as lawful because of its exertion in practice by the state and federal courts and the implications arising therefrom.*

There is no doubt that in some States, without reference to probation legislation or an affirmative recognition of any doctrine supporting the power, it was originally exerted and the right to continue to do so came to be recognized solely as the result of the prior practice. *Gehrmann* v. *Osborne, Warden*, 79 N. J. Eq. 430.

As to the courts of the United States, in one of the circuits, the first, especially in the Massachusetts district, it is admitted the practice has in substance existed for probably sixty years as the result of a system styled "laying the case on file." The origin of this system is not explained, but it is stated in the brief supporting the practice that courts of the United States have considered the existing state laws as to probation and have endeavored in a certain manner to conform their action thereto. It is true also, that in the courts of the United States, sometimes in one or more districts in a circuit and sometimes in other circuits, in many instances the power here asserted was exerted, it would seem without any question, there being no objection raised by the representatives of

the United States; indeed it is said that in Ohio where the power, as we have seen, was recognized as existing, it was exerted by Mr. Justice Matthews of this court when sitting at circuit, and there and elsewhere, it is pointed out, the power was also exerted in some instances by other judges then or subsequently members of this court. But yet it is also true that, numerous as are the instances of the exertion of the power, the practice was by no means universal, many United States judges, even in a district where the power had been exerted, on a change of incumbency persistently refusing to exert the power on the ground that it was not possessed. Indeed so far was this the case that we think it may be said that the exertion of the power under the circumstances stated was intermittent and was not universal but partial.

As amply shown by the case before us, we think also it is apparent that the situation thus described was brought about by the scrupulous desire of judges not to abuse their undoubted discretion as to granting new trials, and yet to provide a remedy for conditions in cases where a remedy was called for in the interest of the administration of the criminal law itself, as well as by the most obvious considerations of humanity and public well-being,—conditions arising in the nature of things from the state of proof in cases coming before them which could not possibly have been foreseen and taken into consideration by the law-making mind in fixing in advance the penalty to be imposed for a particular crime. And the force of this conclusion will become more manifest by considering that nowhere except sporadically was any objection made to the practice by the prosecuting officers of the United States, who indeed it is said not infrequently invoked its exercise. Albeit this is the case, we can see no reason for saying that we may now hold that the right exists to continue a practice which is inconsistent with the Constitution, since its exercise in the very nature of things

amounts to a refusal by the judicial power to perform a duty resting upon it and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution. The fact that it is said in argument that many persons, exceeding two thousand, are now at large who otherwise would be imprisoned as the result of the exertion of the power in the past, and that misery and anguish and miscarriage of justice may come to many innocent persons by now declaring the practice illegal, presents a grave situation. But we are admonished that no authority exists to cure wrongs resulting from a violation of the Constitution in the past, however meritorious may have been the motive giving rise to it, by sanctioning a disregard of that instrument in the future. On the contrary, so far as wrong resulting from an attempt to do away with the consequences of the mistaken exercise of the power in the past is concerned, complete remedy may be afforded by the exertion of the pardoning power; and so far as the future is concerned, that is, the causing of the imposition of penalties as fixed to be subject, by probation legislation or such other means as the legislative mind may devise, to such judicial discretion as may be adequate to enable courts to meet by the exercise of an enlarged but wise discretion the infinite variations which may be presented to them for judgment, recourse must be had to Congress whose legislative power on the subject is in the very nature of things adequately complete.

While the conclusions just stated inevitably exact that the rule which is before us be made absolute and that the mandamus issue, nevertheless we are of opinion that the exceptional conditions which we have described require that we exercise that reasonable discretion with which we are vested to temporarily suspend the issue of the writ, so as to afford ample time for executive clemency or such other action as may be required to meet the sit-

uation. And for this purpose the issue of the writ will be stayed until the end of this term, unless the United States otherwise requests, when it will go as a matter of course.

Rule made absolute.